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In the Supreme Court of the United States

OCTOBER TERM, 1979

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Henry Kissinger, Richard M. Nixon, John N. Mitchell and H. R. Haldeman, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-53a) is not yet reported. The opinions of the district court (Apps. B and C, *infra*, 54a-59a, 60a-77a) are reported at 424 F. Supp. 838 and 434 F. Supp. 1193.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 78a-79a) was entered on July 12, 1979. On October 2, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the President and his closest advisors, including the Attorney General, are absolutely immune from personal damages liability for decisions made in the exercise of the President's official authority.

2. Whether these federal officers are entitled to a qualified immunity as a matter of law for authorizing electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972).

3. Whether the Court's decision in *United States* v. *United States District Court*, and lower court rulings amplifying that decision, should be applied retroactively to create a personal damages liability for federal officers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. At the time of the events leading to this litigation, 18 U.S.C. 2511(3)[1] provided, in pertinent part:

> (3) Nothing contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of

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[1] 18 U.S.C. 2511(3) was repealed by Section 201(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797. This statute, which establishes procedures for the conduct of electronic surveillance for national security purposes, was enacted nine years after the events that gave rise to this litigation.

the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

STATEMENT

1. Between February and April of 1969, President Richard M. Nixon, Assistant to the President H. R. Haldeman, and other high administration officials became concerned that leaks to the press of certain foreign policy documents and classified information were eroding "the candor of foreign governments in dealings with this country" (App. A, *infra*, 4a). The information that was being improperly divulged revealed the foreign policy position of the United States on several important and sensitive issues, including strategic arms limitations talks then under way with the Soviet Union, peace proposals for the Middle East, the termination of our then-substantial military involvement in Viet Nam, and the return of the island of Okinawa to Japanese control (Jt. App. 106-111, 120-121; see App. C, *infra*, 61a).[2] The President and his advisors believed that the untimely release of this classified information might seriously jeopardize the government's foreign policy initiatives in these areas (Jt. App. 120). They also believed that the source of these leaks was likely to be personnel at the Na-

[2] "Jt. App." refers to the Joint Appendix filed in the court of appeals.

tional Security Council ("NSC") because the leaked information included certain statements made during confidential discussions within that agency (*id.* at 129-132).

Accordingly, on April 25, 1969, President Nixon met with Attorney General John N. Mitchell, NSC Director Henry Kissinger and FBI Director J. Edgar Hoover to discuss methods for controlling security breaches at the NSC. Hoover advised President Nixon that electronic surveillance, including wiretaps, was an effective method of determining the source of leaks and had been used by previous administrations for similar reasons (Jt. App. 126, 136). Attorney General Mitchell gave his opinion that the use of wiretaps to discover the source of the leaks would be legal (Jt. App. 126). The President thereupon authorized a program of electronic surveillance and adopted three criteria to identify individuals who would be investigated: (a) access to classified material that had been leaked; (b) unfavorable information in the individual's security file; and (c) FBI investigations that listed the individual as a potential source of leaked information (Jt. App. 137; see App. C, *infra*, 61a). At President Nixon's request, Kissinger prepared a list of officials who had access to leaked information (Jt. App. 112). Morton Halperin, Chief of the NSC Planning Group, was on that list (*ibid.*).

On May 9, 1969, an article incorporating classified information concerning United States bombing missions in Cambodia appeared in the *New York Times*

(Jt. App. 108-109). At the President's request, Kissinger called Hoover that same day and asked him to investigate the source of the security leak (*id.* at 46, 147-148). Hoover informed Kissinger that Halperin was a possible source (Jt. App. 49-50) and a wiretap was installed on Halperin's home telephone that evening (*Hearings* at 23).[3] Acting pursuant to the President's authorization, Attorney General Mitchell approved the wiretap on May 12, 1969 (Jt. App. 51-53). While the wiretap continued, Halperin resigned his full-time position with the National Security Council in September 1969 and resigned as a consultant to Kissinger in May 1970. After additional surveillance failed to reveal that Halperin was the source of the leaks, the wiretap was removed from his phone on February 10, 1971 (Jt. App. 83).

2. The existence of this wiretap was revealed during the trial of Daniel Ellsberg in May 1973 (Jt. App. 212-213). After learning of the wiretap, Halperin and his wife and children (the respondents) filed this action in the United States District Court for the District of Columbia, alleging that the wiretap was unlawful under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* The suit was brought against petitioners and other federal

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[3] "*Hearings*" refers to *Dr. Kissinger's Role in the Wiretapping of Certain Government Officials and Newsmen: Hearings Before the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. (1974).

officers[4] and sought money damages and declaratory and injunctive relief.

On cross motions for summary judgment, the district court concluded that respondents had established a right to recover under the Fourth Amendment but not under Title III. With regard to Title III, the court stated that "[i]nterpretation of this statute and of the President's domestic power thereunder" was entirely unsettled prior to *United States* v. *United States District Court*, 407 U.S. 297 (1972), and that petitioners "should not be held to have acted at their peril in this vacuum," especially in light of "the 30-year history of similar Executive actions" (App. C, *infra*, 66a). The court thus held that petitioners were entitled to a qualified good-faith immunity defense as a matter of law to respondents' statutory claims (*id.* at 66a-67a).

The district court concluded, however, that the wiretap constituted an unreasonable search in vio-

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[4] In addition to petitioners Kissinger, Nixon, Mitchell and Haldeman, the complaint named as defendants John Ehrlichman, Alexander Haig, William Sullivan, Robert Mardian, Jeb Stuart Magruder and the Chesapeake and Potomac Telephone Company. The district court granted summary judgment in favor of these defendants (App. C, *infra*, 74a-77a). The district court also awarded summary judgment to Kissinger because his role in the wiretap was "inactive" and he had no "oversight authority" (*id.* at 75a). The court of appeals reversed the grant of summary judgment to Kissinger, holding that there were genuine issues of material fact concerning his role in installing and maintaining the wiretap (App. A, *infra*, 49a-50a). We do not seek review of the latter ruling in this petition.

lation of the Fourth Amendment.[5] The court recognized that "[t]here was justifiably grave concern in early 1969 over the leaking of confidential foreign policy information" but held that, "even granting the inapplicability of the general warrant requirement [to this surveillance]," the wiretap of respondents' telephone was constitutionally unreasonable because it continued for 21 months without an effort to minimize the number or type of conversations overheard (App. C, *infra*, 68a-70a).

The district court determined that neither the President, the Attorney General, nor the other defendants were entitled to an absolute immunity from damages liability for authorizing an electronic surveillance in violation of the Fourth Amendment (App. C, *infra*, 70a & n.8). In addition, although the court found that petitioners' conduct "cannot fairly be characterized as a wanton, reckless or malicious disregard of [respondents'] rights" (App. B, *infra*, 56a), it held that petitioners were not entitled to a qualified good-faith immunity from damages liability because "their activities relating to the wiretap continuance [were] in violation of established Fourth Amendment rights" (App. C, *infra*, 73a). Because respondents did not allege any actual injury from

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[5] The district court accepted petitioners' contention that the requirements of *United States* v. *United States District Court*, *supra*, were either inapplicable to national security surveillances or, in the alternative, should not be applied retroactively to the facts of this case (App. C, *infra*, 65a-67a).

the wiretap, however, the court awarded only nominal damages of one dollar (*id.* at 56a).[6]

3. The court of appeals reversed the judgment of the district court and remanded for further proceedings. The court held that petitioners' failure to obtain a warrant prior to conducting electronic surveillance of persons suspected of divulging classified information to authorized persons, and their failure to terminate such surveillance within a reasonable period of time, constituted violations of the Fourth Amendment that gave rise to a cause of action in damages against these federal officers (App. A, *infra*, 29a-32a). The court of appeals also agreed with the district court that (i) the President and his close advisors (including the Attorney General) are not entitled to an absolute immunity with respect to their authorization and implementation of such surveillance and (ii) petitioners are not entitled to a qualified immunity as a matter of law with respect to the continuation of the surveillance for an unreasonable period because "there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution" (App. A,

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[6] The district court also ordered petitioners to insert certain exonerating materials into respondent Morton Halperin's security file and enjoined petitioners from making any use of the intercepted communications (App. B, *infra*, 57a-58a). These portions of the court's judgment were not appealed. Hence, the only remaining issues in this case concern petitioners' personal liability in money damages.

infra, 41a).[7] The court remanded the case to the district court for a determination whether petitioners acted in good faith in authorizing a warrantless electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, *supra* (App. A, *infra*, 31a).

On respondents' statutory claims, the court of appeals remanded for a determination whether, as respondents asserted, the primary purpose of the surveillance was not to "protect[] national security information against foreign intelligence activities" (App. A, *infra*, 28a). The court held that if some other purpose was intended, petitioners' failure to obtain a warrant would subject them to damages liability under Title III (18 U.S.C. 2511, 2520) (App. A, *infra*, 27a-28a).[8] Finally, the court held that more

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[7] The court of appeals mistakenly implied that the district court had found that the wiretap was continued in bad faith (App. A, *infra*, 41a). The district court did not make such a finding. To the contrary, it held that, although petitioners' conduct was not reasonable under the Fourth Amendment (App. C, *infra*, 73a), the conduct was not engaged in recklessly or with "malicious disregard of [respondents'] rights" (App. B, *infra*, 56a). See also note 27, *infra*.

[8] We do not seek review of this portion of the decision of the court of appeals at this time only because we think that the district court already has determined that the primary purpose of the surveillance was to protect national security information from exposure to foreign intelligence activities (App. C, *infra*, 61a-62a) any that any proceedings on remand would support that ruling. Public disclosure of confidential material achieves the same result as espionage, in that the material is received by foreign intelligence activities. Ac-

than nominal damages should be awarded if, on remand, respondents can establish emotional distress or other intangible injury (*id.* at 33a-35a).

REASONS FOR GRANTING THE PETITION

This case presents issues of exceptional importance that should be decided by this Court. Before the lower court decisions in this case, no court had ever ruled that the President of the United States may be held personally liable in money damages for the official acts that he takes during his conduct of office. The decision of the court of appeals threatens seriously to interfere with the proper administration of the Executive Branch by the President. Further review by this Court is warranted not only by the signal importance of the questions that are presented, but also because the decision below conflicts with decisions of this Court and other courts of appeals.

1. a. The most significant and unprecedented holding of the court of appeals is its conclusion that the President and his closest personal advisors, including the Attorney General, may be held liable in money damages for constitutional violations that occur in the performance of the President's official responsibilities. There can be no dispute about the constitutional authority of the President to protect

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cordingly, even under the analysis of the court of appeals, no liability can be established under Title III. In this petition, we seek review only of issues relating to respondents' claim that petitioners are personally liable in money damages for the alleged constitutional violations.

the national security and conduct our Nation's foreign relations.[9] It has long been recognized that these are areas committed to the Executive Branch by Article II and that, in carrying out his responsibilities, the President must be accorded a broad discretion. See, *e.g.*, *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

It also has long been recognized that in the exercise of these and other discretionary executive powers, the Constitution requires that the President not be personally accountable in judicial proceedings for his conduct of office. Members of the First Congress, many of whom were instrumental in the drafting of the Constitution, concluded that no action could be

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[9] The success or failure of the President's conduct of foreign affairs necessarily depends, in large part, on the confidentiality of communications within the government and with foreign powers. The Nation's first President observed that "[t]he nature of foreign negotiations requires caution, and their success must often depend on secrecy * * *." 1 J. Richardson, *Messages and Papers of the Presidents* 194 (1896), quoted in *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936). "[I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy." *New York Times Co.* v. *United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). Accordingly, in order to exercise effectively his authority to conduct foreign relations, the President must have discretion to act to protect the confidentiality of information bearing on the exercise of that authority. See also *Katz* v. *United States*, 389 U.S. 347, 359-360 (1967) (Douglas, J., concurring).

instituted personally against the President because to permit a single judge or court to exercise such authority could "stop the whole machine of government." W. Maclay, *Sketches of Debate in the First Senate of the United States* 152 (1880). As Justice Story remarked:

> There are * * * incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention while he is in the discharge of the duties of his office; and for this purpose, *his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and is accountable only to his country, and to his own conscience.* This decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive.

Story, *Commentaries on the Constitution of the United States* § 1563 at 418-419 (1883: 1970 De Capo Press reprint) (emphasis supplied). In light of this tradition, few litigants had ever attempted to sue the President for damages based on his official conduct, and on the isolated occasions when such actions have been filed, the federal courts consistently have ruled that the President may not be held personally accountable. See *Reese* v. *Nixon*, 347 F. Supp. 314,

316-317 (C.D. Cal. 1972), aff'd in relevant part, No. 72-3070 (9th Cir. May 3, 1974); *Davis* v. *Nixon*, No. 73-1520 (C.D. Cal. June 18, 1974). Indeed, at least before this Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), it was generally held that all high-ranking executive officials of the federal government were absolutely immune from personal damages liability for their discretionary official acts. See *Barr* v. *Matteo*, 360 U.S. 564, 571-575 (1959) (plurality opinion); *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950); W. Prosser, *The Law of Torts* 988 (4th ed. 1971) (collecting cases).[10]

The court of appeals concluded, however, that as a result of this Court's decision in *Butz* v. *Economou*, the President is entitled to only a qualified good-faith immunity in damages actions challenging his official acts. The court of appeals reasoned that, under *Butz*, executive officials generally are entitled to only a qualified good-faith immunity unless the officials are

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[10] Moreover, it had also generally been held that, if the absolute immunity of the President and other "highly placed executive officers of the government, when acting in line of duty, is to serve its intended purpose, it must extend to subordinate officials * * * who execute the official's orders." *Heine* v. *Raus*, 399 F.2d 785, 790 (4th Cir. 1968). See also *Doe* v. *McMillan*, 412 U.S. 306, 320 (1973) (Public Printer is absolutely immune from damages liability for carrying out functions that, if performed by a Congressman, would be within the protections of the Speech or Debate Clause); *Spaulding* v. *Nielsen*, 599 F.2d 728, 729 (5th Cir. 1979) (probation officer is absolutely immune from damages liability because he acts "at the direction of the court").

involved in adjudicative or prosecutive functions (App. A, *infra*, 36a)[11] and that the President is not entitled to any greater immunity than is generally accorded to his subordinates because he cannot be set "apart from * * * other high Executive officials" (*id.* at 42a).[12] The court stated that according the President only a qualified immunity will not "hinder effective governance of the nation" (*id.* at 45a) because "suits that may successfully be pursued against a President will be quite rare" (*ibid.*).

The decision of the court of appeals is a disturbing one, both in its assertion of a judicial authority to conduct routine oversight of the President's conduct of office in personal damages actions and in its disregard of the express limitations of this Court's hold-

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[11] For this reason alone, the court of appeals concluded that the Attorney General and the President's close advisors have only a qualified immunity when they render legal advice to the President or act for the President in authorizing a national security wiretap (App. A, *infra*, 36a-41a).

[12] The court of appeals noted that the chief executive officers of the states enjoy only a qualified immunity from damages liability under 42 U.S.C. 1983 (App. A, *infra*, 48a n.144, citing *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974)). But the question of the immunity of state officials under Section 1983 presents interests of a different kind and nature than are involved here. See note 17, *infra*.

The court of appeals also stated that its decision to accord the President only a qualified immunity is "mandated by our tradition of equal justice under law" (App. A, *infra*, 49a). But it is hard to square this assertion with the court's recognition that judges and legislators are absolutely immune for their official acts (*id.* at 36a, 42a).

ing in *Butz*.[13] The Court held in *Butz*, that, "[a]lthough a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, * * * there are some officials whose special functions require a full exemption from liability." 438 U.S. at 508.[14] As the Court explained in *Butz*, the common law accords an absolute immunity when it is required by "public policy" and is "essential for the conduct of the public business." *Id.* at 506, 507.[15]

First, in suggesting that exposure to liability will not hamper the President because successful suits against him "will be quite rare" (App. A, *infra*, 45a), the court of appeals did not adequately examine the justifications for absolute presidential immunity in personal damages actions. The fact that successful

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[13] Judicial review of the President's conduct of office in personal damages actions would threaten the principle of separation of powers. *Reese* v. *Nixon*, *supra*, 347 F. Supp. at 316-317.

[14] Indeed, four Justices in *Butz* would have held that all "high-ranking" federal officers are entitled to an absolute immunity from constitutional torts when "acting within the outer limits of their authority." 438 U.S. at 518 (Rehnquist, J., concurring in part and dissenting in part).

[15] The court of appeals' emphasis on the absence of any specific immunity for the Executive Branch in the Constitution (App. A, *infra*, 42a-43a) is thus simply misplaced. There is no specific constitutional immunity for the Judicial Branch, yet judges are absolutely immune from damages liability for acts taken in the conduct of their office. See *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871).

suits against the President are exceedingly unlikely counsels strongly *in favor of*, not against, according the President an absolute immunity in damages actions challenging his official acts. As this litigation reveals (see notes 7, 8, *supra*), it is not difficult for an aggrieved plaintiff to allege that the President has taken some official action with malicious intent. If only a qualified immunity is available to the President, the allegations of improper motive would have to "be inquired into [and the President] would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 354 (1871).

Thus, as courts often have recognized in analogous contexts (*ibid.*), it is not the liability that might result in the rare suit where malice is shown, but the burden of defending in all personal actions alleging "malice," that threatens serious interference with the President's conduct of office. Even the court of appeals recognized that there would be "extraordinary practical difficulties confronting a President who is charged in such a suit" (App. A, *infra*, 47a). The court suggested only that district courts "should be sensitive" (*ibid.*) to these difficulties in readying the case for trial.[16]

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[16] As this Court reecntly noted in *Herbert* v. *Lando*, No. 77-1105 (Apr. 18, 1979), a plaintiff who bears the burden of proving malice must be given a fair opportunity to question the defendant to develop the relevant evidence. The same rule would presumably apply when it is the defendant who

Furthermore, we submit that the factors emphasized by this Court in according an absolute immunity to judges, prosecutors and legislators are applicable to the President as well. Most important, "the public trust [placed in the President] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler* v. *Pachtman*, 424 U.S. 409, 424-425 (1976). The President sits at the apex of our system of government. It is no exaggeration to suggest that every day he must make discretionary decisions on matters that affect the lives of virtually every American citizen. Because the easier or less controversial decisions are disposed of at a lower level, it is the rare presidential decision that does not involve difficult choices among reasonable alternatives or have a substantial adverse impact upon some segment of the Nation. The President's decision-making should be motivated solely by considerations of the public welfare, not by fear of personal liability in

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bears the burden of proving his subjective good faith. Thus, a ruling limiting the President to a qualified immunity might require the President to attend a deposition or answer interrogatories in a private civil suit, at the expense of his duties as Chief Executive, or risk the imposition of sanctions, including a default judgment. See Fed. R. Civ. P. 37(b). (Indeed, the court of appeals candidly acknowledged that "[q]uestions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved" (App. A, *infra*, 38a)). This disruption of daily activities might be justified when dealing with a subordinate executive official, but it should not be countenanced in the case of the President.

damages. See App. A, *infra*, 53a (Gesell, J., concurring).

Of course, there is also an undeniable public interest in avoiding abuses of presidential authority. But, as the court of appeals recognized, the occasions of such abuse are likely to be rare. Moreover, there are substantial independent safeguards—such as public opinion and the political and impeachment processes—that effectively minimize the likelihood of intentional presidential misconduct and that can remedy such misconduct should it arise.[17] See *Butz* v. *Economou*, *supra*, 438 U.S. at 512. In view of these safeguards, the importance of preserving presidential discretion clearly outweighs "the need for private damages actions as a means of controlling unconstitutional conduct." *Ibid.* The President should be accorded an absolute immunity so that he can exer-

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[17] These safeguards are substantial. Article II, paragraph 2 of the articles of impeachment recommended by the House Judiciary Committee against petitioner Nixon was based precisely upon the acts alleged by respondent Halperin in this suit. See H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146-150 (1974).

The fact that Congress can investigate and impeach federal officers, but has no similar power with respect to state officers, distinguishes this case from *Scheuer* v. *Rhodes*, *supra*. The important national political checks applicable to the President are also less effective as applied to local or state officials. In *District of Columbia* v. *Carter*, 409 U.S. 418, 429-430 (1973), the Court explained that "the rationale underlying Congress' decision not to enact legislation similar to [42 U.S.C.] § 1983 with respect to federal officials [was] the assumption that the Federal Government could keep its own officers under control * * *."

cise the broad trust imposed in him "without harassment or intimidation." *Ibid.*[18]

b. The defense of absolute immunity, if applicable to the President, should also apply to those whose advice he requires and those who act for him. See note 10, *supra*. The President has the constitutional authority to demand the opinion of his subordinate officers "upon any Subject relating to the Duties of their respective Offices" (Art. II, Sec. 2), and their recommendations are made to him under this constitutional obligation. The Attorney General, in particular, acts not only under this constitutional duty but also under his statutory responsibility to "give his advice and opinion on questions of law when required by the President." 28 U.S.C. 511.[19] Thus, the Attorney General, like a judge, often may be compelled to interpret areas of the law that are ambiguous or unsettled. See *Stump* v. *Sparkman*, 435 U.S. 349, 364 (1978), citing *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at 348. The fact that the Attorney General's advice to the President, and his actions on the President's behalf, frequently may involve impor-

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[18] As Judge Hand stated in *Gregoire* v. *Biddle*, *supra*, 177 F.2d at 581, in determining whether high-ranking executive officers should be accorded an absolute immunity for their official acts, "the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

[19] The Attorney General has a similar responsibility to the heads of the executive departments. 28 U.S.C. 512.

tant and controversial issues "is all the more reason that he should be able to act without fear of suit." *Stump* v. *Sparkman, supra,* 435 U.S. at 364. The President cannot be constrained to act only when the lawful course is clear, and the Attorney General's responsibility to assist the President in selecting the seemingly correct course would be seriously inhibited if every recommendation were made under the threat of personal liability in damages.[20]

Moreover, the Attorney General acts under the same public checks as the President (see note 17, *supra*) and under the same professional restraints that this Court has identified in according an absolute im-

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[20] Because the advice rendered by the Attorney General to the President will often involve problems at the cutting edge of the law, it can be expected that courts will not always agree with the Attorney General's opinion. But the court of appeals effectively held that each time the judiciary disagrees with the Attorney General's advice, and suit is brought by an aggrieved party claiming malice of bad faith, the Attorney General must affirmatively establish his personal good faith in the performance of his office. Such a burden would be regarded as intolerable if imposed on the district courts or courts of appeals each time one of their decisions were set aside on appeal (*Bradley* v. *Fisher, supra*). The burden can no more easily be borne by the Attorney General. Under the holding of this case, he must prove his good faith by testimony and evidence submitted in actions brought (as here) years after the relevant events have transpired. And the Attorney General may have to explain to a lay jury why he elected one rather than another interpretation of a complex question of law. The imposition of this burden on the Attorney General "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray,* 386 U.S. 547, 554 (1967).

munity to prosecutors. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 428-429. The minimal risk of intentional misconduct by the Attorney General in performing his responsibilities as the chief legal advisor to the President is outweighed by the need to preserve "the vigorous and fearless performance of [a] duty that is essential to the proper functioning of the [Executive Branch]." *Id.* at 427-428.

2. Even assuming that petitioners have only a qualified immunity for their official acts, the court of appeals erred in concluding that petitioners did not establish their entitlement to that immunity as a matter of law. The doctrine of qualified immunity is premised on the belief that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz* v. *Economou*, *supra*, 438 U.S. at 506-507. It is undisputed that, at the time of the wiretap challenged in this case, there were no "clearly established" constitutional restrictions on the President's use of electronic surveillance for national security purposes.

In 1972, over a year after the wiretap involved in this case had been terminated, this Court noted that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress

or a definitive decision of this Court." [21] *United States* v. *United States District Court*, *supra*, 407 U.S. at 299. See also *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967); *id.* at 363-364 (White, J., concurring).[22] Because there were no clearly established constitutional procedures applicable to national security wiretaps at the time of the events in this case, petitioners should have been accorded a qualified immunity as a matter of law for their official acts. See *Baker* v. *McCollan*, No. 78-752 (June 26, 1979), slip op. 1-2; *Procunier* v. *Navarette*, 434 U.S. 555, 564 (1978).

The court of appeals disagreed with this conclusion, apparently for two reasons. First, without disputing that there was no clearly established warrant requirement for national security wiretaps before 1972, the court of appeals stated that the district court had correctly ruled that the application of the Fourth Amendment's reasonableness requirement to national security surveillances was "established law" at the time of petitioners' actions in this case (App. A, *infra*, 40a-41a). The district court had concluded that the duration of the wiretap on respondents' telephone

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[21] Presidential and Justice Department documents reflecting the history of this practice are set out in Appendix E, *infra*, 8a-85a.

[22] Justice White stated in his concurring opinion in *Katz* (389 U.S. at 363-364) that warrant procedures are inapplicable to national security wiretaps "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable."

(21 months) was unreasonable and thus in violation of the Fourth Amendment,[23] a fact that (according to the court) petitioners Mitchell and Haldeman at least should have known (*id.* at 40a).[24] But neither the district court nor the court of appeals cited any preexisting case law or statutes to support the conclusion that the length of the challenged wiretap violated "established law." This is understandable because, in 1970 and 1971, there was literally *no* "established law" concerning what the Fourth Amendment required in the context of national security surveillances. In 1972, in its decision in *United States* v. *United States District Court*, the court noted that such surveillances (407 U.S. at 322):

> involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations

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[23] The court of appeals applied the same reasoning in the companion cases of *Zweibon* v. *Mitchell*, No. 78-1348 (July 12, 1979), petition for cert. filed this date, and *Smith* v. *Nixon*, No. 78-1526 (July 12, 1979), petition for cert. filed this date, though the wiretaps in those cases were far shorter in duration (six and three months, respectively).

[24] The district court did not attribute such knowledge to petitioners Nixon and Kissinger. The court of appeals rejected their claims of qualified immunity nonetheless, holding that they must "establish their subjective good faith [at trial] as an affirmative defense" (App. A, *infra*, 40a).

> against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

Because of these distinctions, the Court recognized that the reasonableness criteria of the Fourth Amendment for national security surveillance are necessarily different than those applicable to ordinary criminal investigations. *Id.* at 322-323. The Court refrained, however, from attempting to describe what the constitutional limits might be. *Id.* at 323. It is thus apparent that there was no "established law" in 1970 and 1971 to guide petitioners in the conduct of the surveillance challenged in this case.[25]

The court of appeals also suggested that petitioners are not entitled to a qualified immunity because the district court had concluded that the wiretap was continued in "bad faith" (App. A, *infra*, 41a). The court of appeals relied in this regard on *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975), which held that the qualified immunity of a school official would be lost if "he took the action with the malicious intention to cause a deprivation of constitutional rights

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[25] Prior to 1972, national security wiretaps averaged between 78 and 209 days in length. *United States* v. *United States District Court*, *supra*, 407 U.S. at 325 (Douglas, J., concurring).

or other injury * * *." The court apparently equated the possibility that the wiretap was continued in "bad faith" with a "malicious intention" to cause "a deprivation of constitutional rights or other injury." [26]

There are two problems with this aspect of the court of appeals' reasoning. First, the district court did *not* hold that petitioners acted in bad faith. The district court ruled instead that, although the continuation of the wiretap by petitioners Mitchell and Haldeman (see note 24, *supra*) violated the reasonableness requirement of the Fourth Amendment, their conduct was not reckless or done with "malicious disregard of [respondents'] rights" (App. B, *infra*, 56a).[27] Because there was no clearly established law to guide petitioners' conduct, and because they did not act with malicious intent, petitioners were entitled to a qualified immunity as a matter of law even under the standards of *Wood* v. *Strickland*. See *Baker*

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[26] It seems obvious, however, that petitioners could not have maliciously intended to deprive respondents of a constitutional right that, at least in 1970 and 1971, was not known to exist. See also page 27, *infra*.

[27] The district court thought that petitioners' claim of qualified immunity failed because their conduct violated "established law" (App. C, *infra*, 73a), not because of any claimed subjective malicious intent. The court did conclude, however, that petitioners had not made an affirmative showing of subjective good faith, stating that their conduct was in disregard of settled law and that the evidence reflected a "seemingly political motive" for the continued surveillance (*id.* at 74a).

v. *McCollan*, *supra*, slip op. 1-2; *Procunier* v. *Navarette*, *supra*, 434 U.S. at 562. Cf. *United States* v. *Peltier*, 422 U.S. 531, 541-542 (1975).

Moreover, the precise limits of the doctrine of qualified immunity are not the same for all officials, but vary "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 247. It is undisputed that the scope of discretion and breadth of responsibility entrusted to the President, and to the advisors who assist and act for him, differ markedly from those of federal officials generally. The same reasons that support the conclusion that these officials are absolutely immune for their official acts (pages 11-22, *supra*) also indicate that, if their immunity is only qualified, they should not be required to disprove allegations of "malice" in personal damages actions.

The court of appeals recognized that charges of malice can easily be made and that the necessity of a trial on such claims could seriously disrupt the President's conduct of office (App. A, *infra*, 47a). See page 17, *supra*. Because of the special functions performed by the President and the need to avoid undue interference with this responsibility in a scheme of separated powers, the President and officials acting for him should be entitled to qualified immunity as a matter of law where their conduct did not ignore or defy clearly established constitutional require-

ments. This application of the qualified immunity doctrine to the President and his close advisors would impose a judicial restraint on intentional misconduct without subjecting the President to the possibility of a lengthy and disruptive hearing on allegations of malice that would rarely be sustainable (see App. A, *infra*, 45a).

3. The court of appeals held that the principles established in *United States* v. *United States District Court*, *supra*, and *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)—both of which were decided after the wiretap in this case was discontinued—should apply retroactively to create a cause of action for damages as a result of the unconstitutional surveillance of an American citizen for national security purposes (App. A, *infra*, 29a-31a).[28] The court's decision in this regard con-

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[28] The court of appeals relied on the reasoning of *Zweibon* v. *Mitchell*, *supra*, which it decided on the same day. In its first decision in *Zweibon*, the court had concluded that the principles of *United States* v. *United States District Court* apply to domestic national security cases, unless the target of the surveillance is an agent of, or a collaborator with, a foreign power, 516 F.2d 594, 655 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976) (*Zweibon I*). We do not seek review of this aspect of the decision in *Zweibon I* because essentially the same result is now provided for by the Foreign Intelligence Surveillance Act of 1978. See note 1, *supra*. Indeed, under Section 104(a) of the Act, prior judicial authorization is now generally required even if the target of the surveillance is a foreign agent or collaborator. 92 Stat. 1788-1789. The President may, however, authorize such surveillance in limited circumstances without applying for a judicial order. Section 102(a) of the Act, 92 Stat. 1786-1787.

flicts with the decision of the Ninth Circuit in *Weinberg* v. *Mitchell*, 588 F.2d 275, 277-278 (1978), and is based on a misapplication of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

In *Chevron Oil*, the Court held that retroactive application of substantive rules announced in judicial decisions is inappropriate (1) if the decision established a new rule of law by deciding an issue of first impression in a way not "clearly foreshadowed" by earlier decisions, (2) if retroactive application of the rule would not further its purpose or (3) if retroactive application would impose hardship or produce inequitable results. Each of the factors identified in *Chevron Oil* argues against retroactive application of the principles established in *United States* v. *United States District Court* in a suit claiming personal damages liability.

First, the Court expressly noted that its decision in *United States District Court* involved questions of first impression (407 U.S. at 299),[29] and, in view of the fact that "[t]he use of such surveillance in internal security cases [had] been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946" (*id.* at 310), it cannot be said, and the Court did not suggest, that its decision

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[29] Indeed, the Court stated that the question being decided there was a "delicate" and "important one" and that that case brought "the issue here for the first time." 407 U.S. at 299.

was clearly foreshadowed. See *id.* at 299, 319-320.[30] Second, retroactive application of that decision would not further its purpose because "[t]he rule looks to a *future* free from [unreasonable] surveillance." *Weinberg* v. *Mitchell, supra,* 588 F.2d at 278 (emphasis added). See also *United States* v. *Peltier, supra,* 422 U.S. at 535. The deterrent purpose of the rule plainly is not served by its retroactive application to conduct wholly completed before its announcement. *Id.* at 538.[31] Third, because the law was not clearly established, retroactive application of the principles of *United States* v. *United States District Court* to establish personal damages liability would be inequitable. Indeed, as the Ninth Circuit stated in *Weinberg* v. *Mitchell, supra,* 588 F.2d at 278, it "would be as inequi-

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[30] In the context of criminal trials of defendants whose constitutional rights were violated, the Court has noted that "in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application." *United States* v. *Peltier, supra,* 422 U.S. at 535.

[31] In *Morales* v. *Hamilton,* 391 F. Supp. 85 (D. Ariz. 1975), the district court rejected the claim that *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), should be applied retroactively to create a *Bivens* cause of action for damages against officers who conducted roving border patrol searches. The court concluded that retroactive creation of such a damages action would violate *ex post facto* principles and that *Almeida-Sanchez* should not be construed to give a "plaintiff a cause of action which he did not originally have." 391 F. Supp. at 88.

table as *ex post facto* criminal liability" and "would be nothing short of punitive." See *Morales* v. *Hamilton*, 391 F. Supp. 85, 88 (D. Ariz. 1975).

Moreover, in denying any significance to the district court decisions that had concluded prior to *United States* v. *United States District Court* that warrantless national security wiretaps, authorized by the President or the Attorney General, are valid (see *United States* v. *O'Neal*, Cr. No. KC CR 1204 (D. Kan. Dec. 1, 1970); *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970)),[32] the court of appeals failed to heed this Court's admonition in *United States* v. *Peltier*, *supra*, 422 U.S. at 542:

> [U]nless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm.

By contrast, the Ninth Circuit correctly applied the factors announced in *Chevron Oil* in refusing to recognize a cause of action for a national security surveillance that preceded the decision in *United States* v. *United States District Court*. This Court should resolve the conflict.

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[32] See also *United States* v. *Butenko*, 494 F.2d 593 (3d Cir.), cert. denied, 419 U.S. 881 (1974); *United States* v. *Clay*, 430 F.2d 165 (5th Cir. 1970), rev'd on other grounds, 403 U.S. 698 (1971).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2014

MORTON HALPERIN ET AL., APPELLANTS

v.

HENRY KISSINGER ET AL.

No. 77-2015

MORTON HALPERIN ET AL.

v.

HENRY KISSINGER ET AL.
RICHARD M. NIXON, JOHN N. MITCHELL,
AND H. R. HALDEMAN, APPELLANTS

Appeal and Cross-Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 1187-73)

Argued February 9, 1979

Decided July 12, 1979

Before WRIGHT, *Chief Judge*, ROBINSON, *Circuit Judge*, and GESELL,* *District Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Concurring opinion filed by *District Judge* GESELL.

WRIGHT, *Chief Judge*: Morton Halperin, a former member of the National Security Council (NSC) staff, and his family sued ten federal officials for money damages following revelations that their home telephone had been tapped by the Government from May 1969 until February 1971.[1] The Halperins alleged that the wiretap, which was installed during an investigation into public disclosures of confidential information,[2] was prohibited by both the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[3] On cross-motions

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292 (a) (1976).

[1] The defendants were President Richard Nixon, former Attorney General John Mitchell, National Security Adviser Henry Kissinger, presidential aides H. R. Haldeman, John Ehrlichman, Alexander Haig and Jeb Magruder, FBI Director Clarence Kelley and FBI official William Sullivan, and Assistant Attorney General Robert Mardian. The suit also named the Chesapeake & Potomac Telephone Company (C&P) as a defendant, but plaintiffs do not appeal the District Court's judgment in favor of C&P. Joining Halperin in the complaint were his wife, Ina, and their three minor children.

[2] The investigation eventually included electronic surveillance of 13 Government employees and four newspaper reporters, including the appellant in a case we also decide today, *Smith* v. *Nixon*, —— F.2d —— (D.C. Cir. No. 78-1526, decided July 12, 1979).

[3] Pub. L. No. 90-351, 82 STAT. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1976).

for summary judgment in December 1976 the District Court ruled in favor of all defendants except former President Richard M. Nixon, former Attorney General John N. Mitchell, and former presidential aide H. R. Haldeman.[4] The court concluded that Nixon, Mitchell, and Haldeman had violated the Halperins' Fourth Amendment rights, but not the terms of Title III. The Halperins were awarded $1 in nominal damages in August 1977.[5]

Plaintiffs and defendants Nixon, Mitchell, and Haldeman appeal the decision.[6] The Halperins insist that the District Court erred in not applying Title III, in awarding only nominal damages, and in granting summary judgment in favor of former National Security Advisor Henry Kissinger. The defendants claim absolute immunity from this action and dispute the District Court's refusal to bar the suit on qualified immunity grounds. We affirm the District Court's conclusions on the immunity question, but reverse on the applicability of Title III, the

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[4] *Halperin* v. *Kissinger*, 424 F.Supp. 838 (D. D.C. 1976).

[5] *Halperin* v. *Kissinger*, 434 F.Supp. 1193 (D. D.C. 1977). If the court had found Title III applicable, plaintiffs would have been entitled to $100 in liquidated damages for each day of illegal wiretapping, plus punitive damages and attorney fees. *See* 18 U.S.C. § 2520 (1976).

[6] Because both sides appeal the decision of the District Court, it is easier to identify the parties by their status in the trial court, in order to avoid confusion among appellants, cross-appellants, and the like. We refer to the Halperins as plaintiffs and Nixon, Mitchell, Haldeman, and Kissinger as defendants.

proper measure of damages, and defendant Kissinger's motion for summary judgment. In addition, we believe that the District Court should have applied the warrant requirement for national security wiretaps as articulated in *United States* v. *United States District Court* (*Keith*), 407 U.S. 297 (1972), and *Zweibon* v. *Mitchell* (*Zweibon I*), 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

I. THE WIRETAP

Shortly after taking office in 1969 President Nixon and his top advisers grew concerned over press disclosures of classified information.[7] In their view such "leaks" limited the Administration's flexibility in developing foreign policy and could have eroded the candor of foreign governments in dealings with this country. On April 25, 1969 the President met in his office with Kissinger, Mitchell, and J. Edgar Hoover, the late Director of the Federal Bureau of Investigation (FBI), to discuss methods for controlling leaks. Mitchell, Hoover, and Nixon continued the discussion over dinner at Camp David that evening and developed a program, including wiretaps on private telephones, for investigation of suspected "leakers." [8] Both Mitchell and Hoover assured Nixon that the

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[7] In response to interrogatories Kissinger listed 20 newspaper articles between February 3 1969 and May 6, 1969 that in his opinion were based on leaked information. Joint Appendix (JA) 129-132.

[8] Nixon Deposition at 18-22, 25-26; Mitchell Deposition at 20-21.

President could order such wiretapping without first obtaining a court order.[9] Three criteria were established at the meeting for identifying individuals to be investigated: (1) access to sensitive data that was being revealed publicly; (2) information in security files that "raised questions" about an individual; and (3) other incriminating information in FBI files.[10]

Over the next two weeks the appearance of several newspaper stories seemingly based on classified reports heightened the Administration's alarm over leaks.[11] The surveillance program was finally triggered by a *New York Times* article on May 9 revealing massive American bombing of targets in Cambodia.[12] Nixon told Kissinger to ask the FBI to investigate the source for the story.[13] Although Halperin had no access to the information in the *Times* article,[14] FBI Director Hoover informed Kissinger

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[9] Mitchell Deposition at 76-79, 81-85; Nixon Deposition at 19-21.

[10] Nixon Deposition at 61; Kissinger Deposition at 28. On these facts the District Court concluded that President Nixon "authorized a program of electronic surveillance of individuals suspected of leaking information detrimental to the national defense and foreign policy of the United States." *Halperin* v. *Kissinger, supra* note 4, 424 F.Supp. at 840.

[11] *See Chronology of Events Relative to the Seventeen Wiretaps and Pertinent Documents,* in *Dr. Kissinger's Role in Wiretapping: Hearings Before the Senate Foreign Relations Committee,* 93d Cong., 2d Sess. 22-23 (1974) (hereinafter cited as *Kissinger Hearings*).

[12] *Raids in Cambodia by U.S. Go Unprotested,* N.Y. Times, May 9, 1969, at 1, col. 3.

[13] Nixon Deposition at 23; Kissinger Deposition at 50.

[14] Halperin Affidavit (Nov. 12, 1973), JA 102.

that Halperin was the "prime suspect." [15] Hoover and Kissinger conferred by telephone four times that day,[16] and the wiretap on the Halperin home telephone was in place by evening.[17] Earlier that day, however, Kissinger had informed Halperin that he was considered a potential leaker, and the two men agreed that Halperin's access to classified information should be curtailed in order to allay suspicions.[18] Three other private telephones were wiretapped in the attempt to find the source of the May 9 article.[19]

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[15] Kissinger Deposition at 48-49. Hoover alleged that Halperin had been a roommate of the reporter who wrote the story. *Id.* Two other items in Halperin's files were deemed to raise questions about his reliability: (1) failure to report in a 1966 Department of Defense form that he had stopped in Greece, Yugoslavia, and the Soviet Union on a previous round-the-world journey; and (2) incorrect identification of a Russian national with whom he lunched in 1967. JA 241-244; *see Kissinger Hearings, supra* note 11, at 182 (testimony of H. Kissinger) (blanks in testimony filled in by answers to interrogatories at JA 133). Halperin attributed the first omission to clerical oversight and the second to his error. JA 219-221. An internal FBI memorandum from Hoover identified Halperin as agreeing to a 1965 proposal for a national sit-in on the Vietnam War, as having subscribed to a Marxist publication, and as being a "so-called arrogant harvard-type [*sic*] Kennedy" man. JA 49-50. For a discussion of Halperin's allegation that he was singled out for surveillance for political reasons, *see* text accompanying note 82-84 *infra*.

[16] *Chronology*, in *Kissinger Hearings, supra* note 11, at 23.

[17] *Id.* at 80 (testimony of J. Adams, Deputy Associate Director of FBI).

[18] Halperin Affidavit, *supra* note 14, JA 102-103; Kissinger Deposition at 58-59.

[19] Memorandum from W. C. Sullivan to C. D. DeLoach (May 11, 1969), JA 51.

The following day FBI officials and Colonel Alexander Haig, Kissinger's assistant, worked out procedures to conduct the surveillance "with no record maintained" in normal FBI files.[20] The Bureau then formally requested wiretap authorization from the Attorney General. With respect to Halperin, the FBI memorandum stated only:

> Halperin, aged 30, was detailed from the Department of Defense to the National Security Council as a senior staff member on January 21, 1969. He was the subject of an applicant-type investigation by the Bureau. While admittedly he has had contact with Soviet nationals the investigation did not disclose at that time any pertinent derogatory information.[21]

Attorney General Mitchell approved the wiretap.[22]

The FBI agents conducting the surveillance compiled summaries of the overhead conversations, but neither preserved the tapes of the conversations nor attempted to minimize overhearing of personal discus-

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[20] *Id.*

[21] Memorandum from J. E. Hoover to Attorney General (May 12, 1969), JA 52.

[22] On May 6, 1969 Attorney General Mitchell had promulgated procedures to be followed in warrantless national security surveillance. Memorandum from the Attorney General to Director, FBI (May 6, 1969), JA 38-45. The procedures specified in that memo—including that a wiretap authorization request identify the target premises and estimate the period of surveillance—were not followed in the instant case. The Justice Department's policy of requiring renewals of wiretap authorizations every 90 days, *see* Mitchell Deposition at 9-10, was also ignored.

sions.[23] Despite observations by the FBI in May and June of 1969 that the Halperin tap was not producing evidence of a leak,[24] Kissinger requested that the taps be continued.[25] On July 8, 1969 the FBI recommended ending some of the electronic surveillance of suspected leakers, including Halperin.[26] On September 15 Kissinger requested termination of all wiretaps except Halperin's and one other.[27] Four days later Halperin resigned from the NSC staff, although at Kissinger's request he continued as a consultant to the Council.[28]

Halperin retained his consultant position until May 1970, but had no access to classified information during that period, and worked only one day for the NSC.[29] The wiretap remained in place. Nor was

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[23] Jones Deposition at 24-27.

[24] Memorandum from W. C. Sullivan to C. D. DeLoach (May 15, 1969), JA 54; Memorandum from W. C. Sullivan to C. D. DeLoach (June 20, 1969), JA 58.

[25] Letter from W. C. Sullivan to J. E. Hoover (May 20, 1969), JA 55 ("Dr. Kissinger said he wanted the coverage to continue for a while longer"); Memorandum from A. Haig to H. A. Kissinger (June 4, 1969), JA 57 (series of "Talking Points" for meeting with Hoover: recommending continuing Halperin tap "so that a pattern of innocence can be firmly established").

[26] Letter from W. C. Sullivan to J. E. Hoover (July 8, 1969), JA 59 ("Halperin has said almost nothing on the telephone. My guess is that he assumes it is tapped.").

[27] Memorandum from W. C. Sullivan to C. D. DeLoach (Sept. 15, 1969), JA 60.

[28] Halperin Affidavit, *supra* note 14, JA 104.

[29] *Id.* *See* JA 161 (Kissinger's answers to interrogatories).

there any reduction in surveillance when he resigned from his consultant position in protest over the American invasion of Cambodia in May 1970. After that resignation, however, the FBI reports on the wiretap were no longer sent to the National Security Adviser, but went to Haldeman, the President's chief administrative aide.[30] In July 1970 the FBI agent in charge of the wiretap suggested to his superior that the surveillance be lifted,[31] but it continued until February 10, 1971.[32]

Plaintiffs cite FBI logs showing that agents overheard more than 600 calls on the Halperin telephone, of which only 28 percent were between Halperin and people outside the family.[33] The summary letters

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[30] Memorandum from C. D. DeLoach to W. C. Sullivan (May 13, 1970), JA 75; Haldeman Deposition at 52-54.

[31] Note to W. C. Sullivan, JA 78 ("I haven't noticed much info of value in recent months from coverage—suggest consider discontinuing").

[32] The taps were removed at the instigation of the FBI, Memorandum from W. C. Sullivan to C. Tolson (Feb. 10, 1971), JA 81; Memorandum from J. E. Hoover to Attorney General (Feb. 11, 1971), JA 83, which had recently been criticized for its wiretapping practices. *Chronology*, in *Kissinger Hearings, supra* note 11, at 29 (citing Feb. 7, 1971 newspaper article criticizing FBI wiretapping). Director Hoover was scheduled to testify before Congress shortly thereafter. *See* S. Rep. No. 94-755, Book III, 94th Cong., 2d Sess. 326 (1976).

[33] Plaintiffs-appellants' brief at 11-12. The FBI logs, which are not complete JA 115, show that 638 calls on the Halperin phone were recorded in whole or in part. Morton Halperin was party to 355 (55%) of the recorded calls on 253 separate dates, but 173 calls (27% of the total) were between him and

from the FBI contain much political information, covering such topics as planned publications criticizing the nation's Vietnam policy,[34] congressional lobbying on war-related legislation,[35] and political campaign plans, including potential opposition to President Nixon in 1972.[36] There is some evidence that the political information was valued at the White House. Disclosure in one of the Halperin summary

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his wife. Two hundred and seventy-seven (43%) of the calls were between Ina Halperin and persons not involved in this suit. Their three minor children were each overheard in at least one conversation in which they were identified, and 13 other log entries refer to unidentified children.

[34] Letter from J. E. Hoover to H. R. Haldeman (Oct. 14, 1970), addendum to plaintiffs-appellants' brief at 3 ("Halperin said he was writing a paper on the President's speech which he intended to give Max Frankel of the 'New York Times' to use as he desired. He also said that he was writing a newspaper article on Vietnam.").

[35] Letter from J. E. Hoover to H. R. Haldeman (May 26, 1970), *id.* at 2 (discussion of McGovern-Hatfield Amendment to cut off military funds); Letter from J. E. Hoover to H. R. Haldeman (June 23, 1970), *id.* at 3 (Halperin "agreed to talk to the 'top people' in the offices of Senators Norris Cotton and James B. Pearson on the war in Cambodia. [ ] described Senator Cotton as 'marginal' on the Church-Cooper amendment but said that Halperin's talk could make Senator Pearson favor the amendment.").

[36] Letter from J. E. Hoover to H. R. Haldeman (Nov. 13, 1970), *id.* at 4 ("Halperin and [ ] also discussed a meeting which may take place this week to advise Senator Muskie concerning 'China policy.'"); Letter from J. E. Hoover to H. R. Haldeman (Dec. 17, 1970), *id.* (discussed "forthcoming trip by Senator Edmund Muskie to Russia and said Muskie was making the trip recommended by Clifford * * *. He also mentioned that Averell Harriman was going with Muskie.").

letters that a former cabinet officer planned a magazine article opposing the Nixon Administration's foreign policy served as the basis for a planned "counterattack" to the anticipated article.[37] The FBI summaries revealed no evidence suggesting that Halperin was leaking classified data.[38]

The records of the Halperin wiretap were minimal. At first the FBI logs were kept at the Bureau in special files, where Kissinger and Haig reviewed them.[39] Subsequently summary letters were sent to Kissinger, Nixon (through presidential counsel John Ehrlichman), and occasionally Mitchell.[40] As noted above,

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[37] An FBI letter to Kissinger on December 29, 1969 said that Halperin had discussed a proposed article in *Life Magazine* by Clark Clifford, former Secretary of Defense, on Vietnam. JA 64. The letter identified foreign policy statements by Nixon that Clifford intended to attack (*e.g.*, that President Thieu of South Vietnam "is one of the five greatest men of our time"; that "Vietnam is one of the finest hours in United States history"). The White House staff researched the alleged quotations, *see* Memorandum from Jim Keogh to Jeb Magruder (Jan. 12, 1970), JA 69, and Ehrlichman wrote to Haldeman, "This is the kind of early warning we need more of—your game planners are now in an excellent position to map anticipatory action." J.A. 70. The Clifford article never appeared.

[38] Part of the relief granted in the District Court was an order that Halperin's security file be amended to include "a statement by Dr. Kissinger that the wiretap produced no information impugning either Dr. Halperin's loyalty or his discretion." *Halperin* v. *Kissinger, supra* note 5, 434 F.Supp. at 1196.

[39] Letter from W. C. Sullivan to J. E. Hoover (May 20, 1969), JA 55.

[40] *Halperin* v. *Kissinger, supra* note 4, 424 F.Supp. at 841.

after May 1970 only Haldeman received the letters. When the surveillance was terminated the records were stored in a White House safe. The wiretap program first came to public attention in the 1973 espionage trial of Dr. Daniel Ellsberg, when the Government admitted that Ellsberg had been overheard by the FBI on Halperin's home telephone.[41] This suit was filed in June 1973, within a month of that disclosure.

II. Individual Rights and National Security

This case presents the conflict between the Government's need to act decisively to safeguard the nation's security and those individual rights that are implicated in any surveillance situation.[42] In such a case we must carefully consider any impact that our decision might have on the nation's ability to defend itself and its vital interests. Equally, as the Supreme Court has said, "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties * * * which makes the defense of the Nation worthwhile." [43] Because of the significance of the competing interests at stake,

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[41] *United States* v. *Russo and Ellsberg*, No. 9373 (C.D. Cal., Order of May 11, 1973). The Ellsberg prosecution, which followed public disclosure of the Pentagon Papers, was dismissed when the Government refused to produce the Halperin wiretap records.

[42] *See United States* v. *United States District Court (Keith)*, 407 U.S. 297, 313 (1972).

[43] *United States* v. *Robel*, 389 U.S. 258, 264 (1967).

we wish to consider their relationship before addressing the particular claims here.

Plaintiffs assert two intertwined constellations of personal rights: those revolving around privacy interests and those growing out of the First Amendment's guarantees of freedom of speech, press, association, and belief. The damage to privacy caused by Fourth Amendment violations was captured by Justice Brandeis' dissent in *Olmstead* v. *United States:* [44]

> [The Framers of the Constitution] conferred, as against the Government, the right to be let alone —the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. * * *

The First Amendment buttresses the individual's protection against indiscriminate or unreasonable wiretapping. Such surveillance invades the citizen's constitutionally protected right to free private discussion,[45] and must inevitably chill public speech. Either result is intolerable.

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[44] 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[45] *See Givhan* v. *Western Line Consolidated School District,* —— U.S. ——, ——, 47 L. WEEK 4102, 4104 (Jan. 9, 1979) (First Amendment rights not lost because communication is private rather than public).

In recent years both the Supreme Court[46] and Congress[47] have recognized the substantial injury to personal rights caused by unreasonable electronic surveillance. Although the technology of investigation has developed dramatically in the last century, the dangers of unwarranted governmental intrusion into citizens' private lives have not changed since Justice Bradley wrote in *Boyd* v. *United States*:[48]

> It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property * * *. * * *

Without vigilant protection of a private space in which each citizen is free to pursue his own ideas and aspirations, we would betray our vision of a society based on the dignity of the individual.

The question presented by this case is when may these constitutional rights be overborne by the Executive to protect the security of the entire nation. Unfortunately, the inherent vagueness of the term

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[46] *See Berger* v. *New York*, 388 U.S. 41, 63 (1967) ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."); *Katz* v. *United States*, 389 U.S. 347 (1967); *Keith, supra* note 42.

[47] *See* 18 U.S.C. §§ 2511-2520 (1976) (Title III); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 STAT. 1783.

[48] 116 U.S. 616, 630 (1886).

"national security" hampers careful analysis.[49] All would agree that the term includes situations where the very existence of the Government is in jeopardy, but consensus may break down beyond such clear instances.

The Supreme Court has taken an extremely narrow view of the circumstances in which the Executive may exercise extraordinary powers under the Constitution. In *Mitchell* v. *Harmony*[50] the Court restricted the military's power to convert to its own use private property in a theatre of war.

> [T]he danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for * * *. * * * [51]

This attitude was echoed in decisions striking down martial law in Indiana in 1864[52] and in Hawaii in 1943.[53] In both cases the Supreme Court ruled that

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[49] *See Keith, supra* note 42, 407 U.S. at 314 ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' "); *id.* at 320 ("inherent vagueness of the domestic security concept"); *Zweibon* v. *Mitchell (Zweibon I)*, 516 F.2d 594, 653-654 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

[50] 54 U.S. (13 How.) 115 (1851).

[51] *Id.* at 134.

[52] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

[53] *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946).

normal judicial processes may be superseded only when "foreign invasion" or "civil war" physically close the courthouses.[54] Similarly, in *Youngstown Sheet & Tube Co.* v. *Sawyer*[55] the Court found no basis in the Constitution for the President's seizure of steel mills during a wartime labor dispute, despite the President's claim that the war effort would be crippled if the mills were shut down.[56] Justice Jackson observed on that occasion that, because the drafters of the Constitution "suspected that emergency powers would tend to kindle emergencies," they "made no express provision for exercise of extraordinary authority because of a crisis."[57]

The Supreme Court's steadfast refusal to expand its view of emergency powers reflects an appreciation of the consequences of any national security exception to the usual constitutional limits on Executive conduct. The Court has not denied the reality of dangers from foreign or internal conflicts. Rather, it has recognized the need to respect constitutional requirements even in troubled times. Security inter-

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[54] *Id.* at 326 (Murphy, J., concurring); *Ex parte Milligan, supra* note 52, 71 U.S. (4 Wall.) at 127.

[55] 343 U.S. 579 (1952).

[56] *Id.* at 587 (Black, J.) ("It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution.").

[57] *Id.* at 650 (Jackson, J., concurring). *See also New York Times Co.* v. *United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring); *Zweibon I, supra* note 49, 516 F.2d at 635 n.107.

ests may be affected by fluctuations in international trade and the supply of natural resources, by social unrest at home and abroad, and by public disclosure of policy deliberations. But such events cannot routinely justify invasions of privacy or restrictions on expression without devaluing and eventually destroying those rights.

We believe, therefore, that whatever special powers the Executive may hold in national security situations must be limited to instances of immediate and grave peril to the nation. Absent such exigent circumstances, there can be no appeal to powers beyond those enumerated in the Constitution or provided by law.[58] Any security from one danger purchased with our individual rights would be but an illusion, for its price would be those protections against all other threats to our liberty.

III. Title III and the Fourth Amendment

Standards for evaluating the legality of this electronic surveillance derive from the Constitution and from Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[59] The Government has con-

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[58] *See Zweibon I, supra* note 49, 516 F.2d at 649-650; 18 U.S.C. § 2518(7) (1976). *See also Ex parte Milligan, supra* note 52, 71 U.S. (4 Wall.) at 120-121.

[59] We are not concerned over the justiciability of this case. Although the Constitution exclusively commits the resolution of some questions to the Executive or Legislative Branches, here we are called on to determine whether electronic surveillance was consonant with statutory and constitutional strictures, a traditional judicial function that is governed by well

ceded that the Fourth Amendment's ban on *unreasonable* searches and seizures applied to national security wiretaps in 1969,[60] but disputes the application of the Amendment's judicial warrant requirement.[61] The

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established and manageable standards. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 73 (1978). Decision of these appeals requires no initial policy decisions on how best to deal with the problem of Government leaks; nor need it entail any embarrassment to the Executive. Our course is reinforced by the Supreme Court's decision in *Keith, supra* note 42, which involved "the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval." 407 U.S. at 299. There the Court proceeded immediately to resolution of the merits, rejected the contention that national security wiretaps involve factors "beyond the competence of courts to evaluate," *id.* at 319; *see Zweibon I, supra* note 49, at 641-647, and declined to carve out a national security exception to the warrant requirement of the Fourth Amendment.

Our duty to decide this case is not diminished because we deal with the President's foreign affairs power. The Supreme Court explicitly stated in *Baker* v. *Carr*, 369 U.S. 186, 211 (1962), that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *See United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (the foreign affairs power "must be exercised in subordination to the applicable provisions of the Constitution"). Of course, the Executive's determination that national security was threatened in a particular situation is entitled to deference, *see United States* v. *Nixon*, 418 U.S. 683, 711-712 (1974), but "[E]xecutive action is not proof of its own necessity." *Duncan* v. *Kahanamoku, supra* note 53, 327 U.S. at 336 (Stone, C.J., concurring).

[60] Indeed, that was the Government's argument to this court in *Zweibon I, supra* note 49, 516 F.2d at 628.

[61] *Keith, supra* note 42, 407 U.S. at 314-321; *Zweibon I, supra* note 49, 516 F.2d at 613-614. *Keith* involved a "domestic security" threat posed by an American citizen suspected of

Keith Court observed that "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause," [62] but warrantless searches have been approved in "certain carefully defined classes of cases." [63] Thus we must acknowledge that the Fourth Amendment's warrant requirement may not always apply, while a reasonableness standard may vary in different situations.[64] In contrast, Title III bans most electronic surveillance and specifies procedures for wiretapping and eavesdropping in particular situations; but the statute expressly does not limit the President's constitutional

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planning disruptive actions, such as bombing, while *Zweibon I* concerned a "foreign security" danger resulting from anti-Soviet activities by the Jewish Defense League that might provoke Russian retaliation. *Keith* was a unanimous ruling, and six of the eight judges participating in *Zweibon I* agreed that the Fourth Amendment warrant requirement applied to that surveillance. The other two judges in *Zweibon I* would not have reached the Fourth Amendment issue in that case.

[62] *Keith, supra* note 42, 407 U.S. at 315.

[63] *Camara* v. *Municipal Court,* 387 U.S. 523, 528 (1967). *See, e.g., Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970) (search of federally regulated liquor dealer); *Chimel* v. *California,* 395 U.S. 752, 763 (1969) (arresting officers may search area "within [the] immediate control" of suspect); *Terry* v. *Ohio,* 392 U.S. 1, 20 (1968) (incipient crime).

[64] *See Scott* v. *United States,* 436 U.S. 128, 139 (1978) ("Because of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case."); *Keith, supra* note 42, 407 U.S. at 314 ("the Fourth Amendment is not absolute in its terms").

power to wiretap in national security situations.[65] Although the mandate of the statute is more precise, the reach of the constitutional provision may be seen as greater.[66]

To gauge the propriety of the Halperin surveillance under the overlapping constitutional and statutory standards, we must review the circumstances of the wiretapping and its connection to reasonable national security concerns.[67] If that connection is re-

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[65] The plurality opinion in *Zweibon I*, *supra* note 49, 516 F.2d at 659-670, concluded that although Title III did not affect presidential wiretapping *powers* in national security situations, some of the procedural and remedial provisions of the statute were relevant to constitutional surveillances in such instances. But our decision today in *Zweibon* v. *Mitchell* (*Zweibon III*), —— F.2d ——, —— (D.C. Cir. No. 78-1348, decided July 12, 1979) (slip op. text at notes 52-60), restricts that particular conclusion to prospective effect. Since this case involves events from 1969 until 1971, only the constitutional procedures and remedies are relevant here.

[66] Last year Congress enacted additional legislation, explicitly covering national security surveillance involving foreign policy problems, Foreign Intelligence Surveillance Act of 1978, *supra* note 47, and repealing § 2511(3) of Title III, the pivotal statutory provision in this case. The 1978 statute does not control this case, however. That law expressly does not apply to surveillances that are terminated no more than 90 days after the Chief Justice designates the first judge to sit on a special court to review warrant applications under the new law. Foreign Intelligence Surveillance Act of 1978, 92 STAT. 1798, § 301.

[67] That this relationship may be somewhat distant was conceded by defendant Kissinger in testimony before the Senate Foreign Relations Committee:

> [W]hen one is new in Government, leaks take on an extraordinary significance, because one has a sort of a

mote, or the supposed national security concerns ephemeral, we must remand to the District Court for a determination whether Title III should be applied; where the professed national security issues appear valid, we must still insist on compliance with the Fourth Amendment. We will first consider the applicability of Title III and then examine the requirements of the Fourth Amendment.

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Title III was designed to limit Government use of electronic surveillance techniques. According to the Supreme Court, the statute and legislative history "evince[] the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." [68] This court has observed that "[t]he Act's

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tendency to think that a top secret paper is inviolate * * *.
* * *

One has to be candid. This is sometimes out of proportion to the intrinsic damage that this particular leak may do, looked at in the long view. * * *

Kissinger Hearings, supra note 11, at 323.

[68] *United States* v. *Giordano*, 416 U.S. 505, 515 (1974). *See Alderman* v. *United States*, 394 U.S. 165, 175 (1969) ("The general rule under [Title III] is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant."); *United States* v. *Jones*, 542 F.2d 661, 671 (6th Cir. 1976) ("the pervasive theme of Title III [is] that electronic surveillance should be sharply curtailed and in no instance be undertaken without strict judicial authorization and supervision"); S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968).

essential purpose * * * was to combine a limited and carefully articulated grant of power to intercept communications with an elaborate set of safeguards to deter abuse and to expunge its effects in the event that it should occur." [69]

The statute is straightforward. Section 2511 bans all electronic surveillance not authorized by Title III, with three exceptions not relevant to this case.[70] Surveillance is permitted for investigation of "classes of crimes carefully specified in 18 U.S.C. § 2516," [71] so long as stringent procedural requirements are satisfied.[72] The statute provides for civil as well as

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[69] *In re Evans*, 452 F.2d 1239, 1243 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972).

[70] Those exceptions involve wiretapping by communications common carriers for billing and maintenance purposes, 18 U.S.C. § 2511(2)(a)(i) (1976), by the Federal Communications Commission in its regulatory capacity, *id.* § 2511(2)(b), and by prior consent of a party, *id.* § 2511(2)(c).

[71] *Keith, supra* note 42, 407 U.S. at 301-302. Among the crimes for which surveillance under Title III may be authorized are espionage, sabotage, treason, labor racketeering, murder, kidnapping, robbery, extortion, bribery of public officials, obstruction of justice, gambling, and drug trafficking. 18 U.S.C. § 2516 (1976).

[72] The warrant application must include "a full and complete statement of the facts and circumstances" showing the need for the wiretap or eavesdropping, 18 U.S.C. § 2518(1)(b) (1976), an explanation of why other investigative procedures either have not been successful or are not appropriate, *id.* § 2518(1)(c) and an estimate of the period of surveillance, *id.* § 2518(1)(d). Government agents must minimize the intrusiveness of the surveillance and no warrant can extend for longer than 30 days. *Id.* § 2518(5). Finally, after

criminal prosecution of violators, with minimum civil damages set at $100 for each day of violation, plus punitive damages and attorney's fees.[73] A good faith defense is available to Government officials sued under Title III, as we discuss in detail in Part IV of this opinion.

The applicability of Title III to the Halperin wiretap hinges on Section 2511(3), which enumerates five national security situations in which surveillance would not be covered by the statute. This provision, as the *Keith* Court held, is an "expression of congressional neutrality" on national security surveillances:

> [N]othing in § 2511(3) was intended to *expand* or to *contract* or to *define* whatever presidential surveillance powers existed in matters affecting the national security. * * * [74]

Hence, if a surveillance falls under Section 2511(3), it is still subject to constitutional limitations, but not to Title III's requirements and prohibitions.

Only one of the five circumstances listed in Section 2511(3) might apply to this case: That nothing in Title III "shall limit the constitutional power of the President * * * to protect national security informa-

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the wiretapping or eavesdropping is terminated, all identifiable persons whose communications have been intercepted must be notified of the surveillance unless the investigators show good cause not to do so. *Id.* § 2518(8)(d).

[73] *Id.* § 2520.

[74] *Keith*, *supra* note 42, 407 U.S. at 308 (emphasis in original).

tion against foreign intelligence activities."[75] We face an initial problem in applying this provision to the instant case, since there was never any allegation that the Halperins were directly connected to "foreign intelligence activities." Although it is surely possible for vital secrets to be revealed through a leak to the press, both courts and Congress have looked for a direct link between the wiretap target and a foreign interest as a justification for surveillance.[76] In the absence of such a connection, we must

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[75] The other four circumstances are protection against "actual or potential attack or other hostile acts of a foreign power," obtaining "foreign intelligence information deemed essential to the security of the United States," and protection against either "overthrow of the Government by force or other unlawful means," or any other clear and present danger to the structure or existence of the Government." 18 U.S.C. § 2511(3) (1976).

[76] *See, e.g., Keith, supra note* 42, 407 U.S. at 309 ("There is no evidence of any involvement, directly or indirectly, of a foreign power."); *Zweibon I, supra* note 49, 516 F.2d at 655 (no Executive power for warrantless wiretapping "at least where the subject of the surveillance is a domestic organization that is not the agent of or acting in collaboration with a foreign power"); S. Rep. No. 1097, *supra* note 68, at 94 (discussing § 2511(3) in context of foreign security threats; cites members of Communist Party of the United States as "instruments of the foreign policy of a foreign power" and notes problem of "agents of foreign powers and those who cooperate with them"). The Foreign Intelligence Surveillance Act of 1978, *supra* note 47, specifies procedures for wiretapping and eavesdropping of "agents of a foreign power" and participants in terrorist acts. *Id.* § 101(b) & (c). The following striking passage appears in the House report on that legislation:

> It should be clear from the foregoing, but for the sake of explicitness the committee wishes to make perfectly

closely scrutinize the validity of the national security rationale.[77]

The District Court declined to apply Title III because of "the indisputable difficulties and ambiguities presented by § 2511(3)."

> In view of the confused state of the law and the 30-year history of similar [warrantless national security wiretaps] * * *, the Court finds that defendants' determination that Title III was inapplicable to the Halperin wiretap was reasonable during the period of surveillance. * * * [78]

This statement conflates the standards for a good faith defense with the applicability of Title III,[79] and reflects a fundamental misapprehension of the Hal-

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clear, that *surveillance would not be authorized under this*, or any other definition of agent of a foreign power *against an American reporter merely because he gathers information for publication in a newspaper, even if the information was classified by the Government. Nor would it be authorized against a Government employee or former employee who reveals secrets to a reporter or in a book for the purpose of informing the American people.* * * *

H.R. Rep. No. 95-1283, Part I, 95th Cong., 2d Sess. 40 (1978) (emphasis added).

[77] In view of the well-documented practice of classifying as confidential much relatively innocuous or noncritical information, *see* H.R. Rep. No. 93-221, 93d Cong., 1st Sess. 100 (1973), we cannot conclude automatically that revelation of all "top secret" documents will endanger national security. *See* note 67 *supra; see also New York Times Co.* v. *United States*, *supra* note 57, 403 U.S. at 719 (Black, J.).

[78] *Halperin* v. *Kissinger*, *supra* note 4, 424 F.Supp. at 842.

[79] For discussion of good faith defense and absolute immunity issues, *see* Part IV *infra*.

perins' position. They argue that the wiretap was not related to national security, and thus was subject to the substantive and procedural terms of Title III. If they are correct in their first contention, the second is incontestable. The "30-year history" of warrantless national security wiretaps could not affect the applicability of Title III to nonnational security surveillances. Consequently, the proper inquiry for the District Court was whether the surveillance challenged here was a valid national security action.[80] To the extent that it was not, any uncertainty about the meaning of Section 2511(3) at the time of the wiretapping would be relevant only to the question of the defendants' official immunity to suit. As a result, we must reverse the grant of summary judgment on the statutory claim and remand for a determination by the District Court of whether the surveillance was reasonably intended to guard national security data from foreign intelligence agencies.

In this framework we see little evidence before us for classifying the surveillance from May 1970 to February 1971 as a national security action not reached by Title III. During those nine months Halperin had no official connection with the Government, and, in fact, had lacked access to much classified information for the preceding year;[81] a continuous,

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[80] *See Burkhurt* v. *Saxbe*, 397 F.Supp. 499, 504 (E.D. Pa. 1975).

[81] The Government argues that since much of the information Halperin had access to in his previous jobs remained classified after he left the Government, he was still a potential

year-long wiretap had revealed no evidence that he was a leaker; and the reports on the wiretap were not sent to Kissinger, the President's National Security Adviser, but to Haldeman, a political and administrative adviser. Moreover, since Halperin had almost no official contact with the National Security Council from September 1969 to May 1970, the national security basis for surveillance during those nine months would seem almost equally attenuated. Finally, plaintiffs have raised questions about the purported national security nexus even at the beginning of the wiretap. Halperin claims that the surveillance was initiated for political reasons stemming from his connection to previous administrations.[82] He points to letters from Senator Goldwater to President Nixon and to Attorney General Mitchell recommend-

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leaker. Passing by the problem of overclassification of documents, *see* note 77 *supra*, we think this argument proves too much. It would justify surveillance of thousands of former federal employees without any further indication of security threat.

[82] *See* note 15 *supra*. The second impeachment article approved by the House Judiciary Committee charged President Nixon with abusing the rights of private citizens by authorizing "Electronic Surveillance or Other Investigations for Purposes Unrelated to National Security, the Enforcement of Laws, or Any Other Lawful Function of His Office." H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146 (1974). The Committee added in explanation that Nixon "falsely used a national security pretext to attempt to justify" improper surveillances. *Id.* The Committee also squarely concluded that the May 1969 wiretaps, including Halperin's, were established for "political purposes." *Id.* at 35.

ing his ouster,[83] as well as to Kissinger's apparent request on June 4, 1969 that the surveillance be continued to establish "a pattern of innocence." [84] These events suggest, Halperin argues, that he was initially targeted for surveillance in order to bolster within the Nixon Administration the political credibility of Kissinger's staff appointments.

On remand the District Court must address all of these contentions. Title III will apply to any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities. Where the parties have posed genuine issues of material fact, the court will have to undertake an evidentiary inquiry. Summary proceedings should be limited to those instances where the record before the court indicates no such issue.[85]

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[83] JA 35-37.

[84] Memorandum from A. Haig to H. Kissinger (June 4, 1969), JA 57.

[85] Rule 56 of the Federal Rules of Civil Procedure directs that a motion for summary judgment must be granted if the materials submitted to the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Mazaleski* v. *Treusdell*, 562 F.2d 701, 717 (D.C. Cir. 1977); *Askew* v. *Bloemker*, 548 F.2d 673, 679 (7th Cir. 1976). *See also* text at notes 113-118 *infra*.

In view of the extensive discovery that has taken place in this case, the District Court may well be able to resolve remanded questions without reopening the record. It remains in the court's discretion, naturally, to receive additional submissions as necessary.

B

Throughout the 21 months of the Halperin wiretap the defendants in this case were under an obligation to comply with both the reasonableness and the warrant requirements of the Fourth Amendment. The District Court found that at some point during the surveillance the wiretap

> developed into a dragnet which lacked temporal and spatial limitation. It represent[ed] the antithesis of the "particular, precise, and discriminate" procedures required by the Supreme Court in numerous Fourth Amendment cases. * * * [86]

Although we agree that the surveillance did not satisfy the reasonableness standard, we must remand for consideration both of the warrant question and of *when* the wiretap became unreasonable. In addition, we cannot affirm the award of $1 nominal damages for the constitutional violations established here.

1. When the Supreme Court first applied the warrant provision of the Fourth Amendment to wiretapping in 1967, it expressly reserved the question of prior judicial approval of national security surveillances.[87] In *Keith*, however, the Court found that a

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[86] *Halperin* v. *Kissinger*, *supra* note 4, 424 F.Supp. at 843 (*citing Osborn* v. *United States*, 385 U.S. 323, 329-330 (1966); *Berger* v. *New York*, *supra* note 46, 388 U.S. at 55-60; *Katz* v. *United States*, *supra* note 46, 389 U.S. at 354-357)).

[87] *Katz* v. *United States*, *supra* note 46, 389 U.S. at 358 n.23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

warrant was necessary before a domestic target deemed a threat to national security could be wiretapped, and in *Zweibon I* this court ruled that a warrant was needed to wiretap a domestic group that may be concerned with foreign affairs but "that is not the agent of or acting in collaboration with a foreign power * * *." [88] At the root of these decisions was the conviction that prior judicial approval of wiretapping for national security matters, absent exigent circumstances, falls within the competence of the judiciary,[89] poses no additional threat to national security,[90] and provides a valuable check on Executive discretion.[91]

For the reasons articulated in our opinion today in *Zweibon* v. *Mitchell* (*Zweibon III*),[92] we conclude that a warrant was required for the Halperin wiretap in May 1969. The reasoning of both *Keith* and *Zweibon I*, which dealt with wiretaps initiated during the same period, applies with equal force to this situation, and there is no basis for limiting those cases to prospective effect. The District Court in the instant case "[a]ssum[ed] *arguendo*" that defendants were

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[88] *Zweibon I, supra* note 49, 516 F.2d at 655.

[89] *Keith, supra* note 42, 407 U.S. at 320; *Zweibon I, supra* note 49, 516 F.2d at 641-647.

[90] *Keith, supra* note 42, 407 U.S. at 320-321; *Zweibon I, supra* note 49, 516 F.2d at 647-648.

[91] *Keith, supra* note 42, 407 U.S. at 316-317; *Zweibon I, supra* note 49, 516 F.2d at 633-636.

[92] —— F.2d —— (D.C. Cir. No. 78-1348, decided July 12, 1979).

not subject to the warrant requirement, although it is not clear from that opinion whether the assumption was based on retroactivity considerations or defendants' possible immunity from suit.[93] In any event, such an assumption for purposes of argument is no substitute for a specific holding by the District Court. Of course, the defendants may be able to make out an immunity defense by arguing that due to uncertainty in the law on the warrant requirement there were reasonable grounds in 1969 for their failure to acquire a warrant, and that they did not act in bad faith.[94] This is a distinct question, however, from whether the Fourth Amendment mandated a warrant.

2. As we discussed above, we believe that Title III most likely should apply to at least part of the period of the Halperin surveillance. Nevertheless, for any period during which the District Court concludes that the surveillance was genuinely based on national security concerns, the wiretap might still have violated the Fourth Amendment's reasonableness standard.[95] The duration or conduct of the surveillance might well be deemed to have been unreasonable in view of the likely product of the wiretap, especially after the initial period. In that event, the trial court

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[93] *See Halperin* v. *Kissinger, supra* note 4, 424 F.Supp. at 842-843.

[94] *See* Part IV *infra.*

[95] The constitutional remedy would be relevant only if the more specific procedures and remedies of Title III were not applicable. Of course, the constitutional and statutory remedies could not be granted simultaneously.

would have to establish the time span of that constitutional violation in order to determine damages.[96]

3. Damage suits for the vindication of individual rights date from the eighteenth century in England,[97] and have been widely recognized in our courts.[98] The Supreme Court stated in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, "[D]amages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[99] The instant suit is squarely within this tradition, and the Halperins are "entitled to recover money damages for any injuries [they have] suffered as a result of the * * * violation of the [Fourth] Amendment."[100]

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[96] Although the plurality in *Zweibon I*, *supra* note 49, found that some of the procedures and the civil damages provision of Title III should apply to unconstitutional wiretaps in national security situations, our ruling in *Zweibon III*, *supra* note 65, restricts that position to prospective effect. As a result, the District Court in this case will have to consider compensatory damages for any unconstitutional surveillance. *See also* note 106 *infra*.

[97] *See Entick* v. *Carrington*, 95 Eng. Rep. 807, 19 How. St. Tr. 1030 (1765) (unlawful search by King's officers); *Wilkes* v. *Wood*, 98 Eng. Rep. 489, 19 How. St. Tr. 1075 (1763) (same).

[98] *See, e.g., Nixon* v. *Condon*, 286 U.S. 73 (1932) (recognizing damage remedy in civil suit alleging wrongful denial of right to vote); *Wayne* v. *Venable*, 260 F. 64 (8th Cir. 1919) (same).

[99] 403 U.S. 388, 395 (1971). In Justice Harlan's pithy phrase, "For people in Bivens' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring).

[100] *Id.* at 397. In *Carey* v. *Piphus*, 435 U.S. 247 (1978), the Supreme Court ruled that in the absence of proof of injury

Even if a constitutional violation inflicts only intangible injury, compensation is still appropriate. In *Paton* v. *LaPrade* the Third Circuit enumerated many of the intangible injuries that might have been suffered by a student unreasonably investigated by the FBI: "stigmatization, invasion of privacy, interference with personality development, and interference with her freedom of association through the decision of others to shun her." [101] This approach has been followed by other circuits in suits alleging con-

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plaintiffs alleging violation of procedural due process rights may win only nominal damages. We think that holding does not require a similar award to the Halperins for two reasons. First, the Court emphasized that the "prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.* at 264-265. The due process issue in *Piphus* concerned a student's right to a pre-suspension hearing, so it would indeed have been difficult to estimate the plaintiff's injury unless he could have shown that he would not have been suspended if a hearing had been held. The substantive rights asserted by the Halperins are of a much different character, as is evident from the traditional damage remedy for unlawful search marked by the English cases of *Entick* and *Wilkes*, *supra* note 97, and our *Bivens* doctrine. *See Carey* v. *Piphus*, *supra*, 435 U.S. at 264-265 (distinguishing cases involving "denial of Fourth Amendment rights"). Second, the Supreme Court ruled that the plaintiff in *Piphus* might still prove actual injury but simply could not claim a presumption of injury. *Id.* at 262-264. To the extent that the plaintiffs here can establish actual though intangible injury, damages would clearly be appropriate even under *Piphus*.

[101] 524 F.2d 862, 871 (3d Cir. 1975). Because it involved First Amendment and privacy rights, *id.* at 869-870, *Paton* is not limited by the Supreme Court's *Piphus* ruling. *See* note 100 *supra*.

stitutional violations by state officials under 28 [*sic*] U.S.C. § 1983 (1976).[102]

Due to the plaintiffs' reliance on a "presumption" of injury in requesting a damage award, the District Court concluded that there was "no demonstrable injury."[103] We think that conclusion neglected the possibility that plaintiffs might show loss due to emotional distress and mental anguish, traditional bases for tort recovery. Such harm might be demonstrated through direct testimony of the plaintiffs or might be "inferred from the circumstances,"[104] and if established would surely entitle the Halperins to more than nominal recovery. This court has held that in cases involving constitutional rights, compensation "should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *."[105] Specify-

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[102] *See, e.g., Seaton* v. *Sky Realty Co.*, 491 F.2d 634, 636-638 (7th Cir. 1974); *Donovan* v. *Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970).

[103] *Halperin* v. *Kissinger, supra* note 5, 434 F.Supp. at 1195. Plaintiffs attribute their course to a pre-*Piphus* belief that injury should be presumed, based on the lower court rulings in *Piphus* v. *Carey*, 545 F.2d 30 (7th Cir. 1976), and *Hostrop* v. *Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976). *See* note 100 *supra*. We see no reason why, on remand, they should not be permitted to amend their pleadings and attempt to demonstrate injury.

[104] *Seaton* v. *Sky Realty Co., supra* note 102, 491 F.2d at 637-638.

[105] *Tatum* v. *Morton*, 562 F.2d 1279, 1282 (D.C. Cir. 1977) (First Amendment claim).

ing such damages will always be difficult, but they must be at least "an amount which will assure [the plaintiff] that [personal] rights are not lightly to be disregarded and that they can be truly vindicated in the courts." [106]

IV. The Immunity Defense

All individual defendants claim an absolute immunity from civil damage suits for actions undertaken in their official capacities. The District Court rejected these claims, and we agree with that ruling. Defendants, including former President Nixon, are entitled to a qualified immunity on both the Fourth Amendment and the Title III claims if they can show that they had reasonable grounds for believing their actions were legal (the "objective" basis) and that there was no malice or bad faith in either the initiation or the conduct of the wiretapping (the "subjective" basis).[107] Because former President Nixon advances particular arguments in support of his own absolute immunity, we will consider his status separately.

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[106] *Id.* at 1287 (Wilkey, J., concurring). Although not directly controlling for Fourth Amendment violations, *see* note 65 *supra*, it is certainly illuminating that Congress in Title III identified $100 a day as the proper award for victims of unlawful wiretapping. *See* 18 U.S.C. § 2520 (1976). One would expect substantial correspondence between that legislatively established figure for compensation and the amount appropriate for Fourth Amendment violations involving similar harms flowing from similar actions.

[107] *See Zweibon I, supra* note 49, 516 F.2d at 670-673.

A

Officials making adjudicative and prosecutorial decisions are absolutely immune from civil suit based on such actions. This doctrine assumes that the initiation of a prosecution and the resolution of a dispute are especially likely to incite individualized wrath,[108] and that the review processes of the judicial system provide an automatic safeguard against improper actions.[109] Absolute immunity is not available, however, for those same officials for acts not involving adjudication or prosecution.[110]

In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Supreme Court outlined two bases for qualifying the immunity from suit enjoyed by Executive officials: (1) without such qualification the damage actions contemplated by *Bivens* would be "drained of meaning" and many constitutional violations would go

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[108] *Butz* v. *Economou*, 438 U.S. 478, 509-510, 512 (1978); *Imber* v. *Pachtman*, 424 U.S. 409, 424-426 (1976).

[109] *Butz* v. *Economou*, *supra* note 108, 438 U.S. at 512; *Imbler* v. *Pachtman*, *supra* note 107, 424 U.S. at 427; *see also Pierson* v. *Ray*, 386 U.S. 547, 554 (1967). *See generally Stump* v. *Sparkman*, 435 U.S. 349 (1978).

[110] Although defendant Mitchell might be entitled to prosecutorial immunity for some of his actions as Attorney General, this is not such a case since there is no allegation that the Halperin surveillance was part of a criminal prosecution. *See Forsyth* v. *Kleindienst*, —— F.2d ——, —— (3d Cir. No. 78-1611, decided May 22, 1979) (slip op. at 21-22); *Apton* v. *Wilson*, 506 F.2d 83, 93 (D.C. Cir. 1974); *Briggs* v. *Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

unremedied;[111] and (2) since state officials may be held liable for such violations,[112] it would "stand the constitutional design on its head" if the courts established "a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials * * *."[113]

The *Economou* Court adopted for federal officials the objective and subjective standards for qualified immunity of *Wood* v. *Strickland*:[114]

> [An official is] not immune * * * [A] if he knew or reasonably should have known that the action he took * * * would violate the constitutional rights of the [person] affected, or [B] if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury * * *. * * *

We stress that only one of these two standards need be satisfied in order for a defendant to lose his immunity from suit.[115]

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[111] 438 U.S. at 501.

[112] *See* 28 [*sic*] U.S.C. § 1983 (1976).

[113] *Butz* v. *Economou, supra* note 108, 438 U.S. at 504.

[114] 420 U.S. 308, 322 (1975); *See Procunier* v. *Navarette*, 434 U.S. 555, 562, 565-566 (1978); *Pierson* v. *Ray, supra* note 109, 386 U.S. at 557.

[115] We follow the holding in *Zweibon I, supra* note 49, 516 F.2d at 670-671, that the good faith defense specified in § 2520 of Title III, 18 U.S.C. § 2520 (1976), is the same as in constitutional cases. Because Judge Robb concurred in the plurality's position on this point, 516 F.2d at 688, that holding was reached by a majority of this court.

To reduce the potential for harassment of Executive officials, the Supreme Court has recommended resolution of the immunity issue, when possible, on summary judgment.[116] This course is best suited for handling the objective basis for qualified immunity. Courts should be able to determine at the pretrial stage whether there is a genuine issue of material fact as to the reasonableness of a defendant's belief that he was acting legally. On the subjective criterion—which "turns on officials' knowledge and good faith belief" [117]—summary action may be more difficult. Questions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved.[118] Nevertheless, in view of the Supreme Court's emphasis on the importance of summary procedures in suits like this one, District Courts must carefully examine any pretrial claim by a defendant that a plaintiff has not raised a genuine issue of material fact as to defendant's subjective

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[116] *Butz* v. *Economou, supra* note 108, 438 U.S. at 508.

[117] *Apton* v. *Wilson, supra* note 110, 506 F.2d at 95.

[118] *See Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (summary judgment "should be used sparingly * * * where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot"). For application of this principle to cases involving constitutional claims, *see* cases cited in note 85 *supra*. *See also Paton* v. *LaPrade, supra* note 101, 524 F.2d at 872; *Abramson* v. *Mitchell*, 459 F.2d 955 (8th Cir. 1972).

good faith.[119] Should the court conclude on the record before it that the defendant is not entitled to a judgment as a matter of law,[120] the court must move be-

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[119] A formulation of the summary judgment standard in a similar context was offered by the Seventh Circuit in *Askew* v. *Bloemker, supra* note 85, 548 F.2d 679, involving a suit against state officials for violation of Fourth Amendment rights:

> Plaintiffs are entitled to take to the jury the state-of-mind defense on which the defendants herein rely as long as plaintiffs have adduced specific facts from which a reasonable man, viewing all the evidence in the light most favorable to plaintiffs and resolving all testimonial conflicts in the same manner, could infer that the defendants were acting * * * in bad faith * * *.

Of course, at the pleading stage plaintiffs must allege that the defendants acted with "malicious intention" in order to proceed with a claim that immunity should be denied on the subjective criterion. *Procunier* v. *Navarette, supra* note 114, 434 U.S. at 561.

[120] Since pretrial discovery has concluded in this case, *see* note 85 *supra*, we do not attempt to sketch comprehensive standards guiding the discretion of District Judges faced with requests to permit detailed discovery of the mental processes and confidential discussions of Executive decision-makers. We advert to the problem only because we believe close control of discovery in suits against such officials is essential to the preservation of meaningful official immunity. *See United States* v. *Nixon, supra* note 59, 418 U.S. at 703-713 (recognizing a presumptive privilege for confidential conversations between a President and his close advisors, but finding that general interest to be overborne by a specific showing of need for such evidence in a pending criminal trial); *United States* v. *Reynolds*, 345 U.S. 1, 6-12 (1953) (military secrets); *cf. United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (mental processes of administrative decision-makers). Where a showing of need has prevailed over a broad claim of privilege, a District Court might be well advised to

yond summary procedures.[121] At trial defendants would have to establish their subjective good faith as an affirmative defense.[122]

As to defendants Mitchell and Haldeman, the District Court found "their activities relating to the wiretap *continuance* unreasonable." [123] On the subjective claim, the court noted:

> The evidence here reflects a twenty-one month wiretap continuance without fruits or evidence of wrongdoing, a failure to renew or evaluate the material obtained, a lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents.[124]

The District Court also applied the objective standard, finding that the defendants violated the Fourth

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require that inquiries first be made of subordinate officials before sanctioning discovery that imposes on the time of high-level officials.

[121] *Apton* v. *Wilson, supra* note 110, 506 F.2d at 94-95. Judge Gesell in his concurrence has highlighted the central problem posed by the post-*Economou* immunity doctrine: How to make effective the use of summary procedures in preventing harrassment of Executive officials. We believe that the approach we take here conforms with the requirements of Rule 56 of the Federal Rules of Civil Procedure, and with the concerns of the *Economou* Court for the interests of both potential plaintiffs and potential defendants.

[122] *See Zweibon I, supra* note 49, 516 F.2d at 607 n.18.

[123] *Halperin* v. *Kissinger, supra* note 4, 424 F.Supp. at 845 (emphasis added).

[124] *Id.*

Amendment, and, "[l]ike any other citizen, these officials are charged with knowledge of established law and must be held accountable for personal misconduct." [125]

We find no basis for disturbing these rulings. Certainly there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution, and the record contains ample support for the trial court's ruling on bad faith. Under the terms of our remand, however, the District Court will also have to consider any claim by defendants that they are immune from liability for their failure to acquire a warrant for the wiretap, a question which the District Court has not directly addressed.[126] In a complex case like this one, the District Court must undertake a particularized inquiry into the immunity available for each alleged type or period of constitutional or statutory violation in order to safeguard both the individual rights asserted by the Halperins and the freedom of Executive officials to act.

B

In order to accept defendant Nixon's argument that he, as a former President, is absolutely immune

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[125] *Id.*

[126] On the District Court's treatment of the Fourth Amendment warrant requirement, *see* p. 28 *supra*. In addition, the warrant provision of Title III might also be relevant to this case if the District Court determines on remand that there was no national security basis for the initiation of the wiretap. *See* p. 25 *supra*.

from this suit, we would have to hold that his status as President sets him apart from the other high Executive officials named as defendants to this action. Such a distinction would have to rest on a determination either that the Constitution impliedly exempts the President from all liability in cases like this or that the repercussions of finding liability would be drastically adverse. Because we are unable to make that distinction, we do not believe he is entitled to absolute immunity to a damage action by a citizen subjected to an unconstitutional or illegal wiretap.

1. The constitutional scheme betrays no indication that any kind of immunity was intended for the President or the Executive Branch. While congressmen enjoy the privileges of the Speech and Debate Clause of Article I,[127]

> [t]he Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight. * * * [128]

In addition, there are indications that the Constitutional Convention was presented with the question of Executive privileges and chose not to grant any.[129]

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[127] U.S. CONST., Art. I, § 6, cl. 1.

[128] *Nixon* v. *Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (*en banc*).

[129] At one point in the Convention's deliberations, James Madison suggested "the necessity of considering what privileges ought to be allowed to the Executive," 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 503 (1911), but the proposal was not taken up. Charles Pinckney,

The Convention did specify, however, that an impeached President may still be tried in the courts for any offense.[130]

> By contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the President of the routine legal obligations that confine all citizens. * * * [131]

2. The doctrine of separation of powers wisely counsels the judiciary to act with care when review-

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who was intimately involved in consideration of the privileges question, *see id.* at 502; 3 *id.* at 605-606, explained to the United States Senate in 1800 why Madison's suggestion went unheeded:

> . . . Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. . . . No privilege of this kind was intended for your Executive, nor any except that which I have mentioned [speech and debate] for Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilge to what was necessary, and no more.

3 *id.* at 385.

[130] U.S. CONST., Art. 1, § 3, cl. 7.

[131] *Nixon* v. *Sirica, supra* note 128, 487 F.2d at 711. In *United States* v. *Nixon, supra* note 59, the Supreme Court acknowledged a limited Executive privilege of confidentiality, 418 U.S. at 706-707, but that conclusion was based on practical considerations of government, not constitutional text. We review the likely practical effect of our ruling today in text at notes 137-141 *infra.*

ing actions by other branches, but the courts may not evade their constitutional responsibility to delineate the obligations and powers of each branch. Thus, although courts lack power to grant injunctive relief against prospective presidential actions that may be discretionary,[132] Presidents are scarcely immune from judicial process. Courts have intervened in defense of congressional lawmaking prerogatives to block improper presidential exercise of emergency powers [133] and to assert the President's duty to execute mandatory legislative instructions.[134] They have also ordered production of presidential documents needed for orderly functioning of the criminal justice system.[135] Clearly, a proper regard for separation of powers does not require that the courts meekly avert their eyes from presidential excesses while invoking a sterile view of three branches of government entirely insulated from each other.[136] Such an abdica-

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[132] *See Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866); *see also Georgia* v. *Stanton*, 73 U.S. (6 Wall.) 50 (1867).

[133] *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra* note 55.

[134] *Nat'l Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

[135] *United States* v. *Nixon*, *supra* note 59.

[136] *See Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra* note 55, 343 U.S. at 635 (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). *See also id.* at 610 (Frankfurter, J., concurring). Judge McGowan has articulated an approach to separation of

tion of the judicial role would sap the vitality of the constitutional rights whose protection is entrusted to the judiciary.

3. We also find no basis for absolute presidential immunity on what might be termed prudential grounds. We do not believe that any inhibiting effect such suits might have on the presidential will to act should hinder effective governance of the nation. To some extent, of course, the denial of absolute immunity is intended to affect Executive behavior that threatens to violate constitutional rights. We believe, however, that suits that may successfully be pursued against a President will be quite rare.[137]

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powers questions that respects both the separateness and the interdependence of the three branches:

> [S]eparation of powers questions are to be resolved by analyzing with particularity the extent to which an act by one branch prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government. To the extent such interference is perceived, the inquiry must then shift to considering whether the impact of an Act on one branch of government is justified by the need to pursue objectives whose promotion is assigned by the Constitution to a different branch. * * *

Nixon v. *Administrator of General Services*, 408 F.Supp. 321, 342 (D. D.C. 1976) (three-judge court), *aff'd*, 433 U.S. 425 (1977).

[137] *Cf. Dellums* v. *Powell*, 561 F.2d 242, 247 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977) (permitting civil damage action for constitutional deprivation despite disruption of presidential confidentiality, partly because "the infrequent occasions of such disclosure militate against any substantial fear that the candor of Presidential advisers will be imperiled").

And if we are serious about providing a remedy for constitutional violations, there can be no rational basis, as the *Economou* Court emphasized, for holding inferior officials liable for constitutional violations while immunizing those higher up.

> Indeed, the greater power of such [higher] officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. * * *[138]

In addition, the doctrine of qualified immunity, as elaborated by the Supreme Court in *Scheuer* v. *Rhodes* and by this court in *Apton* v. *Wilson*, makes allowance for the additional demands on the time and attention of a Chief Executive.[139] The President, like all citizens, must be held to know the relevant law, but he "may be entitled to consult fewer sources and

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[138] *Butz* v. *Economou, supra* note 108, 438 U.S. at 506.

[139] *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-249 (1974); *Apton* v. *Wilson, supra* note 110, 506 F.2d at 91-92. In *Scheuer* v. *Rhodes* the Supreme Court stressed the "virtually infinite" range of decisions and choices that may face a Chief Executive in a situation:

> [S]ince the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad. * * *

416 U.S. at 247. As this court has stated, such concerns "go to the showing an officer vested with a qualified immunity must make in support of 'good faith belief;' they do not make the qualified immunity itself inappropriate." *Apton* v. *Wilson, supra* note 110, 506 F.2d at 93.

expend less effort inquiring into the circumstances of a localized problem." [140] This sliding scale would apply with even greater force if the President were acting in an emergency situation. The President would lose his immunity only if plaintiffs could show that he acted with "actual malice" [141] or that he failed to meet a statutory or constitutional obligation that was clear under the circumstances as understood at the time.[142] Under this approach plaintiffs would have substantial difficulty in defeating a President's claim of immunity, an outcome that helps satisfy our concern that suits like this one would place major and unwarranted demands on a President's time. In considering the case to be made out by plaintiffs before trial,[143] District Courts should be sensitive to the extraordinary practical difficulties confronting a President who is charged in such a suit.[144]

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[140] *Apton* v. *Wilson, supra* note 110, 506 F.2d at 93.

[141] *See Wood* v. *Strickland, supra* note 114, 420 U.S. at 321.

[142] *See Scheuer* v. *Rhodes, supra* note 139, 416 U.S. at 246-247.

[143] *See* text at notes 119-122 *supra.*

[144] Stressing the crucial importance to democratic government of independent lawmakers, the Supreme Court has recognized an absolute immunity for state and local legislators which parallels the protection afforded to federal lawmakers by the Speech and Debate Clause of the Constitution. Such immunity, the Court has said, spares the legislators the "cost and inconvenience and distractions" of a public trial, and protects them from speculation by a finder of fact as to their motives for legislative actions. *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951); *Lake County Estates, Inc.* v. *Tahoe Regional*

4. We do not think that the personal burden on the President of having to answer civil suits like this one is so great as to justify absolute immunity. Like other Executive officials, he is represented by the Government if he is sued for his official actions,[145] and there seems to be no basis for greater solicitude for the personal finances of a President ordered to pay damages for his constitutional violations than for a governor or a cabinet officer.[146]

Planning Agency, —— U.S. ——, ——, 47 U.S. L. WEEK 4256, 4260 (March 6, 1979). Taken in the abstract, these considerations might seem to support absolute immunity for the President, or, indeed, for any Executive official. We do not, howexer, find them compelling here. *Scheuer* v. *Rhodes*, *supra* note 139, and *Butz* v. *Economou*, *supra* note 108, establish that high Executive officials in state or federal positions do not enjoy the same immunity as lawmakers do. Because no defensible distinction can be made between the President and other high Executive officers for immunity purposes, we find no basis for applying to the President the absolute immunity of legislators.

[145] 28 C.F.R. §§ 50.15-50.16 (1978). Representation may be denied if the Department of Justice determines "that it is not in the interest of the United States to represent the employee." *Id.* § 50.15(b)(4). *See also* 28 U.S.C. § 516 (1976).

[146] Legislation is currently pending in Congress that would provide a cause of action against the federal government for individuals harmed by officials acting in the course of duty. H.R. 193, 96th Cong., 1st Sess. (1979). A similar measure was the subject of hearings in the last Congress and was favorably reported by the subcommittee considering it. *Federal Tort Claims Act: Hearings on H.R. 9219 Before the Subcommittee on Administrative Law and Government Relations of the House Judiciary Committee*, 95th Cong., 2d Sess. (1978). By waiving sovereign immunity against *Bivens* suits, such legislation would divert litigation from individual officials.

Finally, we think the application of qualified immunity to defendant Nixon is mandated by our tradition of equal justice under law. The President is the elected chief executive of our government, not an omniscient leader cloaked in mystical powers. This court has observed that "[s]overeignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen." [147] The Supreme Court noted this truth in *Economou* when it quoted from *United States* v. *Lee*: [148]

> No man in this country is so high that he is above the law. No officer of the law may set that law at definance with impunity. All officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it.[149]

V. Kissinger's Summary Judgment Motion

The District Court granted summary judgment in favor of defendant Kissinger on the ground that he played an "inactive role" in the surveillance and lacked "oversight authority." [150] We think this ruling was error, since plaintiffs raised genuine issues of material fact as to Kissinger's role in the installation

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[147] *Nixon* v. *Sirica*, *supra* note 128, 487 F.2d at 711.

[148] 106 U.S. (16 Otto) 196, 220 (1882).

[149] *Butz* v. *Economou*, *supra* note 108, 438 U.S. at 506.

[150] *Halperin* v. *Kissinger*, *supra* note 4, 424 F. Supp. at 846.

and maintenance of the wiretap.[151] They demonstrated that Kissinger was involved to some extent in the decision to initiate a surveillance program,[152] that he monitored the product of the surveillance for a full year,[153] and that on at least one occasion he directly requested continuation of the Halperin tap.[154]

We, of course, intimate no suggestion as to Kissinger's liability, but only hold that plaintiffs made a sufficient showing as to his supervisory role to survive a motion for summary judgment.

Accordingly, the judgment of the District Court is reversed and this case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

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[151] For standards for summary judgment, *see* note 85 *supra*.

[152] *See* text at note 8 *supra*.

[153] That is, from May 1969 until May 1970. *See* text at notes 39-40 *supra*.

[154] *See* text at notes 24-27 *supra*.

GESELL, *District Judge, concurring*: I concur in the foregoing opinion except as indicated below.

This suit against a President of the United States and high cabinet-level officials brings into sharp focus the practical difficulties presented by the intimation in *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), which is today accepted by this Court, that the objective and subjective good faith components of the qualified immunity defense can usually be resolved without trial by summary judgment after pretrial discovery. The majority is willing to extend no more protection to top federal officials than is afforded by the normally applicable summary judgment principles. As I see it, this means that if a plaintiff can establish a genuine material issue of fact as to any element of the immunity defense the case will have to proceed to trial. In my view this approach substantially undermines, if not destroys, the immunity doctrine.

We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-

ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision maker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient. In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits.

The effect of this development upon the willingness of individuals to serve their country is obvious. Not only are the personal funds of such officials placed at hazard but many of these cases are political in character, involve highly controversial acts, and will necessarily embroil juries in passing upon the intricacies of executive decisionmaking.

In order to give the immunity doctrine some genuine force and effect, it appears to me that a plaintiff should be required to make a stronger showing than the Court's opinion requires on the immunity question before being permitted to proceed to trial. I would hold that the plaintiff must establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and

convincing evidence, that the official failed to act with subjective or objective good faith.

The problems involved in this area are particularly acute when one considers whether or not a President of the United States should be forced to go to trial and risk being held personally liable in damages where a private individual citizen claims injury as a result of acts taken by the President within the outer perimeters of his duties. Even accepting the view that the absolute immunity defense does not automatically protect a President, but only attaches to those who perform judicial and prosecutorial functions, certainly a rule should be developed which affords more deference to the Office of the President. Our constitutional traditions and decisions such as *United States* v. *Nixon*, 418 U.S. 683 (1974), strongly suggest that in view of a President's grave, complex and unique responsibilities he should receive substantial protection while in office and thereafter from individual damage suits which necessarily intrude into his mental processes and his day-to-day relations and communications with his most intimate advisors.

In short, I urge a more exacting standard be placed on the showing a plaintiff must make before proceeding to trial in the face of a properly presented qualified immunity claim.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS

Aug. 5, 1977

MEMORANDUM OPINION AND ORDER

JOHN LEWIS SMITH, Jr., J.

Following earlier proceedings in this case, the Court found that former President Richard Nixon, his White House Assistant, H. R. Haldeman, and Attorney General John Mitchell had violated the Fourth Amendment rights of plaintiffs Morton Halperin, his wife, and three children by subjecting them to a twenty-one month telephone wiretap. *Halperin* v. *Kissinger*, D.C., 424 F.Supp. 838 (1976). Now before the Court is the question of monetary and injunctive relief.

While conceding that they have suffered no palpable injury,[1] plaintiffs nevertheless insist on damages

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[1] "No plaintiff claims any loss of employment or income resulting from the electronic surveillance overhearings. . . . the disclosure of the electronic surveillance. . . . [or] the purported use of the electronic surveillance." PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' REQUEST FOR ADMISSIONS.

measured by the $100 per day standard set forth in Section 802 of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2520. *See Zweibon* v. *Mitchell*, 170 U.S.App.D.C. 1, 516 F.2d 594, 663-64 (1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). This contention is without merit. The Court has previously ruled that defendants were not bound by the procedural requirements of that statute, and it would be incongruous to subject them to its penalties.

Plaintiffs also seek compensatory damages relying on the theory that compensable injury is presumed in damage suits for violation of constitutional rights. *See Wayne* v. *Venable*, 260 F. 64 (8th Cir. 1919); *Basista* v. *Weir*, 340 F.2d 74 (3d Cir. 1965); *Hostrop* v. *Board of Junior College District No. 515*, 7 Cir., 523 F.2d 569, *cert. denied*, 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976).[2] That presumption cannot be invoked here. Speaking for the Court in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, Justice Brennan limited the damages remedy to only those who "*can demonstrate an injury consequent upon the violation* by federal agents of [their] Fourth Amendment rights". 403 U.S. 388, 397, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619

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[2] *See also Ashby* v. *White*, 92 Eng.Rep. 710, 2 Ld.Raym. 938 938 (1703); *Nixon* v. *Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Nixon* v. *Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); *Piphus* v. *Carey*, 545 F.2d 30 (7th Cir. 1976), *cert. granted*, 430 U.S. 964, 97 S.Ct. 1642, 52 L.Ed.2d 355 (1977).

(1971) (emphasis supplied). *See Zweibon* v. *Mitchell, supra* at 659. In view of the fact that there is no demonstrable injury here, plaintiffs are not entitled to an award of compensatory damages.

Punitive damages are similarly inappropriate.[3] As stated in the prior opinion, "[t]here was justifiably grave concern in early 1969 over the leaking of confidential foreign policy information." Despite the Court's rejection of defendants' good faith defense, their conduct cannot fairly be characterized as a wanton, reckless or malicious disregard of plaintiffs' rights justifying the imposition of punitive sanctions. *See Knippen* v. *Ford Motor Company*, 546 F.2d 993, 1002 (D.C. Cir. 1976).

It is evident, therefore, that the only pecuniary relief available to plaintiffs is nominal damages in the amount of One Dollar.[4]

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[3] The availability of punitive damages in *Bivens* actions is unsettled in this Circuit. *Compare Hartigh* v. *Latin*, 158 U.S.App.D.C. 289, 485 F.2d 1068, 1072 (1973), *cert. denied*, 415 U.S. 948, 94 S.Ct. 1470, 30 L'Ed.2d 564 (1974) *with Zweibon* v. *Mitchell*, 516 F.2d 594, 659, *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). *See Payne* v. *District of Columbia*, 559 F.2d 809 (D.C. Cir. 1977) (Tamm, J., Concurring). *See also Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1973); *Bell* v. *Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

[4] *See Chesapeake & Potomac Telephone Company* v. *Clay*, 90 U.S.App.D.C. 206, 194 F.2d 888 (1952). *Cf. Magnett* v. *Pelletier*, 488 F.2d 33 (1st Cir. 1973) ($1 nominal damages); *See generally*, J. Stein, Damages and Recovery §§ 177-181 (1972).

Plaintiffs further ask for an order enjoining defendants from unlawfully intercepting plaintiffs' future conversations and from using or disclosing information concerning past wiretaps. Mr. Haldeman and Mr. Mitchell are in prison. Mr. Nixon is in voluntary seclusion and is prohibited by the Twenty-Second Amendment from regaining the Office of President. Consequently, the proposed relief is unnecessary.

Plaintiffs seek additional injunctive relief with regard to the disposition of the records of the surveillance. They agree that the original logs, summary letters, authorizations, and other records relating to the wiretap should be retained by the Department of Justice with future access to be determined by the Court. But they insist that they should have the only copy of these records and should be relieved of their obligation, under the April 1, 1974 Protective Order, not to disclose to anyone matter contained therein. The government acquiesces in plaintiffs' request for a copy of the logs but asks that it also be permitted to keep a copy for the duration of three similar, pending cases.[5] This is a reasonable request and it will be granted by the Court. However, the government contention that any gag order should apply to all parties, not just defendants, is viewed in a different light. There is no compelling reason for prohibiting

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[5] *Ellsberg* v. *Mitchell*, C.A. 1879-72 (D.D.C.); *Lake* v. *Ehrlichman*, C.A. 74-887 (D.D.C.); *Smith* v. *Nixon*, C.A. 76-798 (D.D.C.).

plaintiffs from revealing the contents of their own conversations.

Finally Dr. Halperin requests that his security file be amended to include a statement by Dr. Kissinger that the wiretap produced no information impugning either Dr. Halperin's loyalty or his discretion. General Haig had mistakenly informed the FBI that Dr. Halperin was relieved of his National Security Council position because of information gathered from the tap. Fairness requires inclusion of the Kissinger statement, and the government has agreed to add it.

Accordingly, it is by the Court this 5th day of August, 1977

ORDERED that defendants Nixon, Haldeman and Mitchell are liable, jointly and severally, to each of the plaintiffs for nominal damages in the amount of One Dollar; and it is further

ORDERED that the Court's April 1, 1974 Protective Order be, and the same hereby is, dissolved, and all files and documents previously covered by that Order be disposed of as follows: (A) originals of all logs, summary letters, authorizaitons, and records of any other character relating to plaintiffs' wiretap shall be kept in the files of the Department of Justice, with future access to be governed by order of this Court after plaintiffs have been given notice and the opportunity to be heard; (B) after the termination of any appeals, copies of records produced pursuant to the Protective Order shall be destroyed by

all parties except the government, which shall be permitted to retain one copy for the duration of Civil Actions 1879-72, 77-887 and 76-798, and plaintiffs, who shall be permitted to retain a copy for their own use; and it is further

ORDERED that all defendants are permanently enjoined from making any use or disclosure of the intercepted wire communications of the plaintiffs; and it is further

ORDERED that defendants shall insert in Dr. Halperin's security file (A) that portion of General Haig's deposition in which he stated that his FBI interview form 302 incorrectly indicated that Dr. Halperin had been relieved of his National Security Council position because of information gathered from the wiretap, and (B) that portion of Dr. Kissinger's deposition in which he stated that he knew of no wiretap information inpugning either Dr. Halperin's loyalty or his discretion.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS

Dec. 16, 1976

OPINION

JOHN LEWIS SMITH, Jr., District Judge.

This action under the First, Fourth, Fifth, and Ninth Amendments to the Constitution and under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* (Title III), seeks declaratory and injunctive relief and money damages for defendants' allegedly illegal wiretapping of plaintiffs' home telephone. Plaintiffs are Morton H. Halperin, a former Chief of the National Security Council Planning Group, his wife Ina, and their three minor children. Defendants are Henry A. Kissinger, Richard M. Nixon, John N. Mitchell, H. R. Haldeman, Alexander M. Haig, William C. Sullivan, Robert C. Mardian, Clarence Kelley and Jeb Stuart Magruder (hereinafter cited as federal defendants), John Ehrlichman, and the Chesapeake and Potomac Telephone Company (C&P). The matter is

before the Court on plaintiffs' Motion for Summary Judgment against the federal defendants and Motion for Partial Summary Judgment against defendant C&P, federal defendants' Motion for Summary Judgment, defendant Ehrlichman's Motion for Summary Judgment, defendant C&P's Motion for Summary Judgment, and defendant Nixon's Motion to Dismiss.

I

Many of the central facts in this case are undisputed and can be recounted briefly. Between February and April of 1969, Nixon Administration officials grew increasingly concerned about leaks to the press of certain foreign policy documents and classified information. The leaks related to United States policies in Vietnam, China, the Soviet Union, Europe, and the Mideast. In late April 1969, President Nixon, Attorney General Mitchell, National Security Affairs Advisor Kissinger, and FBI Director Hoover met to discuss the problems of leaks and to formulate a plan for stopping unauthorized disclosures. After receiving the Attorney General's legal opinion on the matter and assurances from the FBI Director about previous Executive practice, President Nixon authorized a program of electronic surveillance of individuals suspected of leaking information detrimental to the national defense and foreign policy of the United States. Those to be wiretapped would be selected on the basis of access to information leaked, material in security files, and evidence developed as the surveillance proceeded.

On May 9, 1969, following the appearance of an article in the *New York Times* concerning United States B-52 bombing raids in Cambodia, wiretaps were requested upon four individuals, including plaintiff Halperin. The names were provided by Dr. Kissinger and were transmited by Colonel Haig to the Assistant Director of the FBI's Domestic Intelligence Division, William Sullivan. Three days later, Attorney General Mitchell gave his authorization for the wiretap of the Halperin home telephone.[1] This wiretap remained in effect approximately twenty-one months.

During this period FBI agents monitored telephone communications and prepared logs of many of the conversations. Letters summarizing some of the discussions were prepared and forwarded to FBI Director Hoover for transmittal to the President (through Presidential Counsel Ehrlichman) and to Dr. Kissinger (through Colonel Haig). On occasion, summaries of interceptions were also sent to Attorney General Mitchell. After May 1970, the FBI's summary letters were sent only to Presidential Assistant Haldeman, who was to screen the letters for relevant information. On February 10, 1971, the Halperin wiretap was removed.

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[1] Interceptions and monitoring of the Halperin home telephone began on the evening of May 9, 1969. The Halperin wiretap was one of 17 wiretaps instituted against 13 government officials and four newsmen between May 1969 and February 1971. All of these individuals were suspected of leaking or receiving classified government documents.

Subsequently, after discussions involving Mr. Sullivan, Assistant Attorney General Mardian, President Nixon, and Mr. Ehrlichman concerning disposition of the wiretap documents, the records were taken from the FBI's custody and placed in a safe in Ehrlichman's White House office. Failure to produce the documents resulted in the dismissal of a criminal case involving the Pentagon Papers, *United States* v. *Russo and Ellsburg*, No. 9373 (C.D.Cal., Order of May 11, 1973). On May 12, 1973, the Halperin wiretap records were recovered from Ehrlichman's safe and returned to the FBI. Plaintiffs filed this action on June 14, 1973.

II

A

A threshold question confronting the Court is the applicability to this action of Title III's procedures and remedies for electronic surveillance. Although this statutory scheme was in effect during 1969-1971 when defendants' wiretapping activities occurred, the legality of warrantless national security wiretaps has been considered only in subsequent judicial decisions. *United States* v. *United States District Court (Keith)*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); *Zweibon* v. *Mitchell*, 170 U.S.App.D.C. 1, 516 F.2d 594 (1975); cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 187 (1976).[2] The *Keith*

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[2] *See generally United States* v. *Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976) cert. denied —— U.S. ——, 97 S.Ct. 1155, 51 L.Ed.2d —— (1977); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144, 157-59 (D.D.C. 1976).

case held that, "[N]othing in [18 U.S.C.] § 2511(3)[3] was intended to *expand* or to *contract* or to *define* whatever presidential surveillance powers existed in matters affecting the national security." 407 U.S. at 308, 92 S.Ct. at 2132. (Emphasis in original.) The Supreme Court in *Keith* proceeded to hold the challenged wiretaps invalid under the Fourth Amendment but did not resolve their legality under Title III. *Compare id.* 407 U.S. at 335-44, 82 S.Ct. 2125 (White, J., concurring in judgment).

In *Zweibon*, the Court of Appeals for this Circuit stated that, ". . . Congress intended that applicability of Title III procedures and remedies in the national security context be contingent upon further judicial

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[3] The statute provides "Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. *Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.* The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." (Emphasis supplied).

pronouncements concerning the constitutional [requirements of national security wiretaps], since Section 2511(3) expressly declined to restrict 'constitutional' Executive surveillance." 516 F.2d at 671. *Zweibon* also pronounced that a warrant—and full compliance with Title III's procedural protections, *e.g.*, 18 U.S.C. §§ 2518-20—are necessary for wiretaps upon a domestic group lacking a relationship with a foreign power. 516 F.2d at 614, 663-70.[4] However, the Court left for remand defendants' contention that the *Keith* and *Zweibon* holdings should not be applied retroactively in a damage suit based upon pre-*Keith* and pre-*Zweibon* surveillance. *Id.* at 607 n. 18.

Having reviewed the entire record in this case, including the extensive depositions and answers to interrogatories, the Court holds as a matter of law that defendants have made out a sufficient good faith defense against the retroactive application of *Keith*

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[4] Despite federal defendants' eleventh hour argument, there is no evidence in the record that this case involved a "foreign surveillance." The *Zweibon* decision carefully delineated the difference between foreign and domestic surveillance and rejected outright any open-ended rationale, such as "national security" or conduct "affecting foreign realtions," to justify warrantless surveillance. 516 F.2d at 651-55; *see also Keith, supra,* 407 U.S. at 309 n.8, 92 S.Ct. 2125.

Congress has recently considered the hitherto uncharted and unregulated area of foreign surveillance. S. 3197, as reported, defines foreign intelligence surveillance and contains special procedures for obtaining a judicial warrant prior to any such surveillance. *See* S.Reps. Nos. 1035, 1161, 94th Cong., 2d Sess. (1976).

and *Zweibon*. Without engaging in an exhaustive analysis of legislative history or of pre-*Keith* decisions, the Court notes the indisputable difficulties and ambiguities presented by § 2511(3). Interpretation of this statute and of the President's domestic power thereunder troubled legislators, law enforcement personnel, and courts until the *Keith* decision, when the Supreme Court ruled that the statute was merely a disclaimer of intent to limit constitutionally proper Executive actions. Thus, at least until 1972, and perhaps until the 1975 *Zweibon* decision, see *Keith, supra*, 407 U.S. at 309 n. 8, 92 S.Ct. 2125, the meaning and the limits of § 2511(3) were open issues.

Defendants should not be held to have acted at their peril in this vacuum. In view of the confused state of the law and the 30-year history of similar Executive actions, *see Keith, supra*, 407 U.S. at 310-11, 92 S.Ct. 2125; *Zweibon, supra*, 516 F.2d at 616-19, the Court finds that defendants' determination that Title III was inapplicable to the Halperin wiretap was reasonable during the period of surveillance. The Court further finds no genuine issue of fact in the record controverting this good faith belief on defendants' part. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 242-50, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Apton* v. *Kuhn*, 165 U.S.App.D.C. 22, 506 F.2d 83, 91-94 (1974); *see also Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (standards for nonretroactivity); *Morales* v. *Hamilton*, 391 F.Supp. 85, 89-91 (D.Ariz. 1975). Accord-

ingly, plaintiffs have no cause of action under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

B

The compatibility of the wiretap with the Fourth Amendment is a different matter.[5] Assuming *arguendo* the inapplicability of the warrant provision, *cf. Keith, supra; Katz* v. *United States*, 389 U.S. 347, 358 n. 23, 88 S.Ct. 507, 19 L.Ed.2d 576 (1976), there can be no serious contention that the Fourth Amendment's independent requirement of reasonableness is suspended in the area of national security searches and seizures. In other words, even if § 2511(3) and prior presidential practice could be invoked to authorize warrantless wiretaps, national security surveillance still must be "exercised in a manner compatible with the Fourth Amendment." *Keith, supra*, 407 U.S. at 320, 92 S.Ct. at 2138; *cf. United States* v. *Robel*, 389 U.S. 258, 264, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967). To resolve the wiretap's reasonableness under the Fourth Amendment, the Court must examine and balance the varying interests presented here; i.e., "the duty of [the] Government to protect the domestic [and foreign] security, and the potential

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[5] The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

danger posed by [allegedly] unreasonable surveillance to [plaintiffs'] privacy and free expression." *Keith, supra*, 407 U.S. at 314-15, 92 S.Ct. at 2135.

There was justifiably grave concern in early 1969 over the leaking of confidential foreign policy information. The Nixon Administration was seeking new approaches and solutions to a number of persistent world problems, e.g., the Vietnam war, the SALT talks, and Sino-American relations. Unauthorized disclosures could reasonably be viewed as impeding progress and affecting policy-makers' discussions in these areas. It was therefore determined by the highest Executive officials to employ whatever techniques were necessary to investigate and curb leaks. Wiretaps were considered to be one such investigative tool. Specific criteria were established for suspects, including their access to leaked information and their prior security record. A limited number of persons were subjected to such electronic surveillance, many for a relatively short time.

On the other hand, totally apart from objections concerning lack of probable cause in *his* selection, the wiretap on plaintiff Halperin and his family was maintained for a period of twenty-one months. At no time were there any reviews or evaluation of the material obtained through the electronic surveillance.[6]

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[6] *Compare* 18 U.S.C. § 2518(5) (thirty days limit to wiretaps, unless extension granted based upon new showing of probable cause); Memorandum of May 6, 1969 from Attorney General Mitchell to FBI Director Hoover, at 5 (renewal requirements for national security electronic interceptions);

No attempt was made to minimize the interception of plaintiffs' conversations, either as regards individuals intercepted or information gathered. *Compare Berger* v. *New York, supra,* 388 U.S. at 58-59, 87 S.Ct. 1873. No further investigation or questioning of Mr. Halperin took place during this period. In addition, the tap continued after he left the National Security Council to engage in various antiwar efforts, and long after many of the other national security wiretaps were removed. Numerous summary letters in the later course of the surveillance relate solely to Halperin's political activities and beliefs.

The wiretap thus appears to have developed into a dragnet which lacked temporal and spatial limitation. It represents the antithesis of the "particular, precise, and discriminate "procedures required by the Supreme Court in numerous Fourth Amendment cases. *See, e.g., Osborn* v. *United States,* 385 U.S. 323, 329-30, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966); *Berger* v. *New York, supra,* 388 U.S. at 55-60, 87 S.Ct. 1873; *Katz* v. *United States, supra,* 389 U.S. at 354-57, 88 S.Ct. 507. The surveillance constituted an invasion of plaintiffs' privacy and freedom of expres-

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Deposition of John N. Mitchell at 9-10 (90 day renewal procedures under Justice Department regulations).

The Supreme Court in 1967 strongly condemned the extended duration of interceptions authorized by a New York statute. *Berger* v. *New York,* 388 U.S. 41, 59-60, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); *cf.* S.Rep. No. 1097, 90th Cong., 2d Sess. 101, U.S. Code Cong. & Admin. News 1968, p. 2112 (1968) (Title III duration and renewal provisions tailored to meet constitutional requirements set forth in *Berger*).

sion. For these reasons, even granting the inapplicability of the general warrant requirement, the Court finds the wiretap *per se* unreasonable under the Fourth Amendment and unjustified by any possible exception thereto.

III

A

In identifying which defendants were responsible for the wiretap's long continuation, the Court is aided not only by the extensive discovery and documentary evidence in this case but also by wide-ranging Congressional investigations concerning the surveillance program.[7] Despite the fact that recollections differ as to details, the following facts may be stated with certainty:

1.) President Nixon authorized the wiretap program and assumed personal responsibility for its operation.[8]

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[7] *See, e.g.*, Hearings on Dr. Kissinger's Role in Wiretapping Before Senate Comm. on Foreign Relations, 93d Cong., 2d Sess. (1974); Statement of Information, Committee on the Judiciary of the House of Representatives, 93d Cong., 2d Sess., Book VII, pts. 1-4 (1974); H.R. Rep. No. 1305, 93d Cong., 2d Sess. 146-50 (1974) (Judiciary Committee report on impeachment inquiry evidence on wiretap program).

[8] 9 Pres. Doc. 694 (1973) (statement of May 22, 1973 by President Nixon); Hearings on Dr. Kissinger's Role in Wiretapping, *supra*, note 7, at 11 (letter of President Nixon to Sen. Fulbright); Answer of Defendant Nixon to Second Amended Complaint, filed April 11, 1975.

The Court rejects Mr. Nixon's Motion to Dismiss, filed herein and grounded upon the assertion that his discretionary conduct in office presents a non-justiciable issue or a political

2.) Attorney General Mitchell signed the authorization form for the Halperin wiretap and occasionally received written summaries of the interceptions. At no time did he formally re-evaluate the fruits of the wiretap or the need for its continuance, as required by Justice Department regulations.[9]

3.) Dr. Kissinger, through Colonel Haig, provided Halperin's name to the FBI. Thereafter, Kissinger and Haig received written reports on the surveillance, but apparently considered oversight and termination responsibilities to lie with the FBI, the President, and the Attorney General. After May 1970, no further reports on the Halperin wiretap were sent to them.[10]

4.) FBI personnel monitoring the Halperin telephone conversations were not informed of the pur-

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question. Numerous recent decisions indicate that government officials are not immune from suit for alleged illegalities committed in office. *See, e.g., Wood* v. *Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes, supra; Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1974). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 163, 2 L.Ed. 60 (1803).

[9] Letter of William D. Ruckelshaus to John N. Mitchell May 23, 1973, *Statement of Information, supra,* note 7, book VII, pt. 1, at 177-80; *id.* at 157-76, 187, 192-93; *see also* note 6 *supra.*

[10] Deposition of Henry A. Kissinger at 36-38, 76-78, 81-86; Deposition of Alexander M. Haig at 92-96, 106-09, 148-49, 151-53, 158-60; Hearings on Dr. Kissinger's Role in Wiretapping, *supra* note 7, at 173, 185-86, 214-15, 269-74.

pose of the surveillance. Nor were guidelines established concerning what to look for or how to minimize intercepted conversations. During the twenty-one month surveillance, no use was made of regular investigative techniques, such as interviews or lie detector tests.[11]

5.) During the period of the wiretap, defendants Haldeman and Nixon were aware of the fact that no information was being obtained relating to leaks and that much nonpertinent information was being gathered. These defendants took no affirmative action to terminate the surveillance or to reduce its scope.[12]

6.) H. R. Haldeman received and disseminated wiretap reports and information during the period between May 1970 and May 1971. Some of the material was apparently used for partisan political purposes.[13]

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[11] Deposition of Courtland J. Jones at 7, 14, 26; Deposition of Ernest Belter at 38, 43, 57; Deposition of William C. Sullivan at 131; Hearings on Dr. Kissinger's Role in Wiretapping, *supra*, note 7, at 132-38, 153-54, 158.

[12] Deposition of H. R. Haldeman at 43-44, 56-64; Deposition of Richard M. Nixon at 133-35. In a Feb. 23, 1973 meeting with counsel John Dean, President Nixon noted, "But the taps were [bad], too. They never helped us. Just gobs and gobs of material; gossip and bull . . . . The tapping was a very, very unproductive thing. I've always known that . . . [I]t's never been useful in any operation I've ever conducted." Statement of Information, *supra*, note 7, book VII, pt. 4 at 1754.

[13] *See, e.g.*, Summary Letter of May 14, 1970, May 18, 1970, June 11, 1970, June 23, 1970, January 29, 1971.

From this factual base, the liability and responsibility of certain defendants emerges: former President Nixon, for having initiated and overseen the program without any temporal or informational limits on the surveillance; Attorney General Mitchell, for having failed to carry out review and renewal obligations during the entire twenty-one month surveillance period; H. R. Haldeman, for having reviewed the wiretap material for over a year without recommending termination and for having disseminated the material for purposes unrelated to the tap's original justification.

As to these defendants, no objective good faith defense is available. The Court finds their activities relating to the wiretap continuance unreasonable and in violation of established Fourth Amendment rights. *See Zweibon, supra,* 516 F.2d at 670-73; *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 456 F.2d 1339, 1347-48 (2d Cir. 1972). Nor can these defendants claim absolute immunity for their excessive improper actions. *Compare Imbler* v. *Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution* (D.C.Cir. 1976).

As for any contention of subjective good faith, the undisputed record in this case controverts such a defense. In order to show good faith,

> "The official himself must be acting sincerely and with a belief that he is doing right, but an act violating [citizens'] constitutional rights can be

> no more justified by ignorance or disregard of *settled, indisputable law* . . . than by the presence of actual malice." *Wood* v. *Strickland*, 420 U.S. 308, 321, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975) (emphasis supplied); *see also Zweibon*, *supra*, 516 F.2d at 671 n. 274.

The evidence here reflects a twenty-one month wiretap continuance without fruits or evidence of wrongdoing, a failure to renew or evaluate the material obtained, a lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents.

While there may be varying degrees of involvement of these individual defendants, the Court finds under all the circumstances presented that a subjective good faith defense is unavailable. Regardless of intention, they violated plaintiffs' basic, constitutional right to freedom from unreasonable search and seizure. Like any other citizen, these officials are charged with knowledge of established law and must be held accountable for personal misconduct. *See Wood* v. *Strickland*, *supra*, 420 U.S. at 322, 95 S.Ct. 992. The federal defendants named above are liable in compensatory damages to plaintiffs, such damages to be determined after further briefing by the parties. *See Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, *supra*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619.

B

Plaintiffs have no objection to the dismissal of the complaint as to Mr. Magruder. Further, there has

never been any allegation of personal liability of the current FBI Director, who did not even hold office during the events at issue. The remaining defendants in this lawsuit are entitled to summary judgment.

As has been noted, Dr. Kissinger and Colonel Haig provided Mr. Halperin's name to the FBI since he appeared to meet the criteria established for those suspected of leaking classified information. Reports were then furnished to them concerning the surveillance, but they regarded the "triumvirate", in Haig's words,—Nixon, Mitchell, and Hoover—as responsible for determining when to terminate the wiretap. After a period, they received no information on the Halperin matter. In view of their inactive role and the lack of oversight authority vested in Kissinger and Haig, summary judgment as to these defendants is appropriate.

Although Mr. Sullivan of the FBI played a central role in the Halperin wiretap, his actions appear to have been both reasonable and grounded in good faith. Early in the course of the surveillance, he recognized that little useful or relevant material was being gathered from the surveillance. Accordingly, he recommended discontinuance of the Halperin wiretap. He repeated this recommendation on a number of subsequent occasions. *See* Memorandum of W.C. Sullivan to C. D. DeLoach, June 20, 1969; Letter of William C. Sullivan to Mr. Hoover, July 8, 1969. The fact that his entreaties were rejected does not give plaintiffs a Fourth Amendment cause of action against him.

The liability of Mr. Mardian is premised upon his after-the-fact efforts in allegedly concealing the wiretap records. Such actions, however reprehensible, do not constitute a fresh violation of plaintiffs' Fourth Amendment rights. Accordingly, the motion for summary judgment as to defendant Mardian will be granted.

Plaintiffs have sought to keep Mr. Ehrlichman in this action based upon his role as the "conduit" of information for the President and by virtue of a memorandum written in late 1970 or early 1971 concerning use of the wiretap material to anticipate the actions of political opponents. No allegation is made or substantiated that he had any responsibility for the initiation, continuation, or termination of the Halperin wiretap. Nor is mere knowledge of the wiretap program or any after-the-fact activity on his part sufficient to result in liability. Without a cause of action under Title III, any dispute as to Ehrlichman's precise role in "disclosing, using or procuring" intercepted communications, *see* 18 U.S.C. § 2520, becomes moot. For these reasons, defendant Ehrlichman is entitled to summary judgment.

The final defendant, Chesapeake and Potomac Telephone Company, argues persuasively that it played no part in selecting any wiretap suspects or in determining the length of time the surveillance should remain. It overheard none of plaintiffs' conversations and was not informed of the nature or outcome of the investigation. As in the past, C&P acted in reliance upon a request from the highest Executive

officials and with assurances that the wiretap involved national security matters. Under these circumstances, C&P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation.

IV

In summary, the Court finds that there is no cause of action available to plaintiffs under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 for the wiretapping activities complained of herein; that the wiretapping was unreasonable under the Fourth Amendment; that defendants Nixon, Mitchell and Haldeman share joint liability for the Fourth Amendment violations and cannot avail themselves of any good faith defense; and that summary judgment is appropriate as to the remaining defendants in this action. Further briefing will be necessary on the matter of damages. Within twenty days, counsel for the various parties shall submit proposed orders implementing this opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

D.C. Civil Action No. 1187-73

[Filed Jul. 12, 1979]

No. 77-2014

MORTON HALPERIN ET AL., APPELLANTS

v.

HENRY KISSINGER ET AL.

No. 77-2015

MORTON HALPERIN ET AL.

v.

HENRY KISSINGER ET AL., RICHARD M. NIXON, JOHN N. MITCHELL, and H. R. HALDEMAN, APPELLANTS

APPEAL AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WRIGHT, Chief Judge, ROBINSON, Circuit Judge, and GESELL,* District Judge

JUDGMENT

These causes came on to be heard on the record on appeal and cross-appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court is affirmed in part and reversed in part, and these cases are remanded for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: July 12, 1979

Opinion for the Court filed by Chief Judge WRIGHT.

Concurring opinion filed by District Judge GESELL.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

APPENDIX E *

THE WHITE HOUSE
WASHINGTON

CONFIDENTIAL May 21, 1940

MEMORANDUM FOR THE
ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other

---

* These materials were included as an Appendix to the decision of the court of appeals in *Zweibon* v. *Mitchell*, 516 F.2d 594, 673-675 (D.C. Cir. 1975).

countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct[ed] to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

/s/ F. D.R.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

July 17, 1946

The President,

The White House.

My dear Mr. President:—

Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

> "You are therefore authorized and directed in such cases as you may approve, after investiga-

> tion of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."

This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. At the same time, the country is threatened by a very substantial increase in crime. While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to use them in cases vitally affecting the domestic security, or where human life is in jeopardy.

As so modified, I believe the oustanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate at the foot of this letter.

In my opinion, the measures proposed are within the authority of law, and I have in the files of the Department materials indicating to me that my two

most recent predecessors as Attorney General would concur in this view.

Respectfully yours,

/s/ TOM C. CLARK
Attorney General

July 17, 1947 [*sic*]

I concur.

/s/ HARRY S. TRUMAN

ADMINISTRATIVELY
CONFIDENTIAL

THE WHITE HOUSE
WASHINGTON

June 30, 1965

MEMORANDUM FOR THE HEADS OF
EXECUTIVE DEPARTMENTS
AND AGENCIES

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of these investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In

my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guidelines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.

(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and unresolved questions of Constitutional interpretation. I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used

for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

/s/ LYNDON B. JOHNSON

DEPARTMENT OF JUSTICE

November 3, 1966

MEMO NO. 493

TO: All United States Attorneys

FROM: Ramsey Clark
Acting Attorney General

* * * * *

* * * Present practice, adopted in July 1965 in conformity with the policies declared by President Johnson on June 30, 1965 for the entire Federal establishment, prohibits the installation of listening devices in private areas (as well as the interception of telephone and other wire communications) in all instances other than those involving the collection of intelligence affecting the national security. The specific authorization of the Attorney General must be obtained in each instance when this exception is invoked. Intelligence data so collected will not be available for investigative or litigative purposes.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305572 137

Supreme Court, U. S.
FILED
AUG 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-880

In the Supreme Court of the United States

OCTOBER TERM, 1979

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

Volume I

Petition for writ of certiorari filed December 7, 1979
Certiorari granted May 19, 1980

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CIVIL DOCKET

United States District Court for the District of Columbia

MORTON H. HALPERIN

vs.

HENRY A. KISSINGER, et al

C.A. No 1187-73

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8. JOHN DOE,		
9. RICHARD ROE, and other unknown agents of the FBI		
10. JAMES POE,		
11. RICHARD ROE, and other employees of the Executive Department and other agencies of government		

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MORTON H. HALPERIN, ET AL

v.

HENRY A. KISSINGER, ET AL

1973		PROCEEDINGS
Jun	14	Complaint, appearance
Jun	14	Summons, Copies (14) and Copies (10) of Complaint issued.
Jun	14	Motion to suppress the contents of certain intercepted wire communications for a protective order and further relief. Affidavit: Exhibits A thru F: P&A's.
Jun	19	Appearance of Edward S. Christenbury as counsel for defts. #1 thru #7; Cal/N.
Jun	19	Appearance of Benjamin C. Flannagan as counsel for defts. #1 thru #7; Cal/N.
Jun	19	Response of defts. #1 thru #7 to pltfs' motion to suppress; appendix A; c/m 6-19-73.
Jun	21	APPEARANCE of Walter B. Slocombe as counsel for pltfs; Cal/N.
Jun	21	APPEARANCE of Leon Friedman as counsel for pltfs; Cal/N.
Jun	21	REASSIGNMENT of case of June 20, 1973 from Judge Flannery to Judge Smith, Hart, J.
Jun	22	MOTION of pltfs. for leave to take deposition of William D. Ruckelshaus; affidavit; Exhibit A; c/s 6-22-73; M.C.
Jun	27	MOTION Hearing: Pltf's motion for a Protective Order heard and Granted (In Part) (OTBP) (Rep-D. Copeland)
Jun	28	ORDER granting all memoranda, and other records relating to interception communications of pltf's shall be maintained by the Court under Seal. (N) Smith, J.
Jun	29	RESPONSE of deft. 7 to pltfs' motion for leave to take deposition; c/m 6-29-73.
Jul	2	SUMMONS & copy of complaint issued to deft. #3. ser. 7-9.

Jul	3	NOTICE by defts. of submission of documents; c/m 7-3-73.
Jul	6	STIPULATION of counsel that the time for Deft #12 to answer be extended to 7/18/73.
Jul	10	ORDER denying pltfs. motion for leave to take deposition. (N) Smith, J.
Jul	11	MOTION OF PLTF to compel surrender of indices; c/m 7/11/73; M.C.
Jul	18	ANSWER of deft. #12 to the complaint; c/m 7-18-73; appearance of Hugh B. Cox.
Jul	18	OPPOSITION of defts. #1 thru #7 to pltfs' motion to compel surrender of indices; c/m 7-18-73.
Jul	19	REQUEST by pltf. to deft. #12 for production of documents; c/m 7-19-73.
Jul	19	REQUEST by pltf. to deft. #1 for production of documents; c/m 7-19-73.
Jul	19	REQUEST by pltf. to deft. #2 for production of documents; c/m 7-19-73.
Jul	19	REQUEST by pltf. to deft. #3 for production of documents; c/m 7-19-73.
Jul	19	REQUEST by pltf. to deft. #4 for production of documents; c/m 7-19-73.
Jul	19	REQUEST by pltf. to deft. #5 for production of documents; c/m 7-19-73.
Jul	19	REQUEST by pltf. to deft. #6 for production of documents; c/m 7-19-73.
Jul	19	REQUEST by pltf. to deft. Clarence Kelly for production of documents: c/m 7-19-73.
Jul	26	NOTICE of defts. of intent to submit additional documents; c/m 7/25/73.
Aug.	13	SUMMONS Copy (1) and Copy (1) of complaint issued deft. #1, ser 8-16-73.
Aug	14	ANSWER of defts. #3 and #4 to complaint; c/m 8-14-73; appearance of John J. Wilson and Frank H. Strickler.

Aug.	14	ANSWER of deft. Mitchell in his former official capacity; c/m 8-14-73.
Aug.	14	MOTION of deft. Mitchell in his official capacity to dismiss; P&A; c/m 8-14-73.
Aug	14	ANSWER of defts. #1,2,3,4,5,6 & 7 to complaint; c/m 8-14-73.
Aug	16	OBJECTIONS of Federal Defts. to pltf's request for production of documents c/m 8-15
Aug	16	ORDER directing plaintiffs motion to compel Surrender of indices Denied; and that the indices of overheard conversation described in paragraph 3 of the Department of Justice Notice of Submission of Documents filed July 3, 1973 be preserved. (N) Smith, J.
Aug.	21	RESPONSE of deft. #12 to pltfs' request for production and inspection of documents; Affidavit; c/m 8-20-73.
Sept.	26	MOTION of pltfs. for leave to file opposition to motion of deft #2 to dismiss; affidavit; memorandum; c/m 9-24-73.
Oct	15	NOTICE of pltf of taking deposition of deft. #6; c/m 10-3-73.
Nov.	1	WITHDRAWAL of Hugh B. Cox as counsel for deft. Chesapeake & Potomac Telephone Co. and appearance of David E. McGiffert.
Nov.	1	DEPOSITION of William D. Ruckelshaus taken on July 25, 1973 for the pltfs.
Nov.	12	STIPULATION granting stay of proceedings on deft's Mitchell's motion to dismiss parties shall notify Court when they wish to proceed, approved. (N) Smith, J.
Nov.	14	APPEARANCE of Walter Hellerstein as counsel for deft. #12; cal/n.
Nov.	30	MEMORANDUM of pltfs' in support of motion to compel production of certain documents and to take the deposition of deft. William C. Sullivan; Table of Authorities; Affidavits (2); c/m 11-30-73, Exhibits A-J.

Dec.	5	MOTION of Defts. #1, 2, 3, 4, 5, 6 and Kelly for enlargement of time; P&A: c/m 12-5-73.
Dec	27	ORDER granting deft's motion for enlargement of time and further order of time within which defts may file their response to pltf's consolidated motion be and the same enlarged to and including January 4, 1974. (N) (See order for details) Smith, J.
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Jan.	4	MOTION by Federal Defts, Kissinger, Haig, Haldeman, Ehrlichman, Mitchell, Kelley and Sullivan for a further enlargement of time; P&A's; c/m 1-4-74.
Jan	11	RESPONSE of pltfs' to Federal defts' motion for enlargement of time; c/m 1-9-74.
Jan	14	RESPONSE of defts. #1, 2, 3, 4, 5, 6, and Kelley to motion of pltfs. to compel discovery and for a protective order; table; c/m 1-14-74.
Jan	24	NOTICE by defts. #2, 3, and 4 and defts. #1, 5, 6 and Kelley of submission of additional documents; c/m 1-24-74.
Jan	28	REPLY by pltfs. to Federal defts. response to motion consolidated by pltf.; c/m 1-28-74.
Mar	22	MOTION by pltf. to compel discovery, argued and granted. (Rep: D. Copeland) Smith, J.
Apr	1	ORDER granting pltfs. motion for production of documents and that within 10 days of this Order defts. shall advise the Court if any of said documents or portions thereof are not in their judgment relevant to the subject matter in this action. (N) Smith, J.
Apr.	5	NOTICE by defts. #1, 2, 3, 4, 5, 6 and Kelley of submission of additional document; c/m 4-5-74.
Apr	16	NOTICE by defts. #1, 2, 3, 4, 5, 6 and Kelley of filing of affidavit; affidavit of Edward S. Christenbury; c/m 4-16-74.

Apr 18 ORDER directing pltfs. to submit list of documents by 4-29-74 and allowing defts. to file objections within 10 days after copies of documents are made. (N) Smith, J.

Apr 19 AFFIDAVIT of Edward Christenbury filed on 4-16-74 under Court Seal this date. (Affidavit in Chambers)

Apr 30 AFFIDAVIT of Water Slocombe; notice; c/m 4-29-74. (Under Court Seal)

May 17 ORDER permitting Committee on the Judiciary to inspect all in camera documents impounded by the Court pursuant to its Order of June 28, 1973. (N) Smith, J.

May 10 NOTICE by pltfs. of filing Affidavit; Affidavit of Walter Slocombe; attached and filed under seal. (Affidavit in Chambers)

May 31 MOTION of Federal deft. Clarence M. Kelley for an order modifying Court's protective order of April 1, 1974; Appendix A; B, C; memorandum; c/m 5-31-74.

May 31 ORDER modifying certain portions of the Court's Order entered 4-1-74; directing all other provisions of this Court's Order of 4-1-74 to remain in effect. (N) Smith, J.

Jun 5 MOTION by federal deft. Clarence M. Kelley for an Order amending this Court's Order of May 31, 1974; and supporting points and authorities in appendix A; c/m 6-5-74.

June 7 RESPONSE by pltfs. to motion of federal deft., Clarence M. Kelly for an Order modifying this court's protective order of 4-1-74; exhibits A & B.

Jun 5 ORDER amending Court's Order of May 31, 1974 permitting federal deft., Clarence M. Kelly to make copy of documents set forth in the appendix to the June 4, 1974 letter of associate counsel Gill and to provide such documents to the House of Representatives Com-

mittee on the Judiciary in accordance with Court's Order of that date. (N) Smith, J.

Jun 12 MOTION by deft. #1 for an Order modifying this Court's Order of 4-1-74; and supporting points and authorities; c/m 6-12-74.

Jun 13 ORDER modifying Order of 4-1-74. Smith, J.

Jun 14 MOTION by pltfs. for expedited consideration of motion by pltfs. for an Order modifying this Court's Order of 4-1-74.

Jun 14 MOTION by pltfs. for an Order modifying this Court's Order of 4-1-74 and supporting points and authorities; c/s 6-14-74.

Jun 14 MOTION of federal deft., Clarence M. Kelley for an Order modifying this Court's Order of 4-1-74 and supporting points and authorities; appendix A; appendix B; c/m 6-14-74.

Jun 14 ORDER modifying Court's Order dated 4-1-74 permitting deft. Kelly to make available to Chairman J.W. Fulbright 1 copy of each document impounded by the Court pursuant to its Order of June 28, 1973 except for logs of the conversations of the pltfs. (N) Smith, J.

Jun 18 OPPOSITION by federal defts. to pltfs. motion to modify this Court's Order of April 1, 1974; c/m 6-18-74.

Jun 19 MOTION of pltf. for Order modifying the Court's Order of April 1, 1974, denied. (Rep: R. Weber) Smith, J.

Jun 21 ORDER denying motion of pltfs. to modify this Court's order of April 1, 1974 with regard to documents. (N) (Signed 6-19-74) Smith, J.

Jun 25 MOTION of deft. Clarence M. Kelly for an order modifying Court's order of April 1, 1974; c/m 6-25.

Jun 25 ORDER modifying Order of 4-1-74 to permit deft. Kelly to make documents impounded by

Order of 6-28-74 and certain other information available to certain persons. (N) Smith, J.

July 5 MOTION by pltfs. to permit Court Reporter to take deposition of deft. 6; c/m—.

Jul 8 MOTION by pltfs. for an Order permitting pltfs. to file amended complaint and modifying this Court's protective order of April 1, 1974 to permit the amended complaint to be filed publicly; exhibit; P&A's; c/m—(Sealed in chambers)

Jul 9 MOTION by pltfs. for an Order in connection with taking depositions of Muriel Hartley, Lawrence Higby and Todd Hullin; P&A's; c/s 7-9-74.

Jul 9 ORDER permitting taking depositions of Muriel Hartley, Lawrence Higby and Todd Hullin; counsel only permitted to have access to documents under Court's Order of April 1, 1974. (N) Smith, J.

Jul 9 ORDER permitting BPA Reporting Associates, Inc., 294 Washington Street, Boston, Mass., 02108, to take deposition of deft. #6, William C. Sullivan. (N) Smith, J.

Jul 10 MOTION by deft. #12 for an Order modifying this Court's Order of April 1, 1974; memorandum; c/m 7-10-74.

Jul 15 FOURTH MOTION by federal deft. Clarence M. Kelley for an Order modifying this Court's Order of May 1, 1974; c/m 7-15-74.

Jul 15 ORDER modifying Court's Order of April 1, 1974 to permit deft. Clarence M. Kelley to make available to J. Fred Buzhardt, counsel to the President, Leonard Garment, Assistant to the President and George P. Williams, Associate Counsel one copy of each of documents impounded by this Court pursuant to its Order of June 28, 1973. (N) Smith, J.

Jul 17 APPEARANCE of Joseph E. Casey as attorney for deft. #6. CD/N

CIVIL DOCKET

July	18	MEMORANDUM of the federal defts. in opposition to the pltfs. motion to modify this Court's protective order to permit the amended complaint to be filed publicly; c/m 7-18-74.
July	19	ORDER modifying Court's Order dated 4-1-74 permitting deft. #12 to disclose documents. (N) Smith, J.
Aug	2	ORDER granting pltfs. leave to file an amended complaint. (N) Smith, J.
Aug	2	AMENDED complaint by pltfs. adding Alexander P. Butterfield and Jeb Stuart Magruder as defts.; and amending paragraphs 11A, 11B, 18A, 20A, 26A, 28A, and 6A.
Aug	2	SUMMONS, copy (1) and copy (1) of amended complaint issued to def. #13: Ser: 8-12-74
Aug	2	SUMMONS, copy (1) and copy (1) of amended complaint issued to deft. #14: Ser: 8-14-74.
Aug	2	SUMMONS, copy (1) and copy (1) of amended complaint issued to D.A.:
Aug	2	SUMMONS, copy (1) and copy (1) of amended complaint issued to AG:
Aug	2	APPEARANCE of John F. Dienelt as attorney for pltfs. CD/N
Aug	8	STIPULATION extending time to and including Aug. 27, 1974 for deft. Chesapeake and Potomac Telephone Co. to answer, move, or otherwise plead to amended complaint. (FIAT) (N) Smith, J.
Aug	9	STIPULATION extending for an additional twenty (20) days federal defts. time within which to respond to pltfs. amended complaint

		up to and including Sept. 1, 1974, approved. (FIAT) (N) 8-8-74 Smith, J.
Aug	19	DEPOSITION of Muriel L. Hartley for pltfs. published and filed.
Aug	22	STIPULATION extending time for deft. H. R. Haldeman to respond to pltfs. amended complaint to and including 9-4-74. (FIAT) (Signed 8-22-74) (N) Smith, J.
Aug	23	MOTION by pltfs. for production of certain deleted materials; P&A's; c/m 8-22.
Aug	23	STIPULATION extending time for deft., Alexander P. Butterfield, to respond to pltfs. amended complaint to and including Sept. 1, 1974. APPROVED. (N) (Signed 8-22-74) Smith, J.
Aug	27	ANSWER to deft. #12, The Chesapeake & Potomac Telephone Co., to amended complaint; c/m 8-27-74.
Sept	3	ANSWER of deft. #13, Alexander P. Butterfield to complaint and amended complaint; c/m 8-30-74. Appearance of Sally S. Reid.
Sept	4	OPPOSITION by defts. #1 thru #7 in part to the pltfs' motion for production of certain deleted materials; c/m 9-4-74. (Filed and placed under seal as of 9-4-74.)
Sept	9	MOTION by federal defts. for enlargement of time within which to answer the amended complaint; P&A's; c/m 9-9-74.
Sept	9	APPEARANCE of Jonathan B. Smith as attorney for federal defts. CD/N
Sept	9	STIPULATION enlarging time of deft. H. R. Haldeman to respond to pltfs. amended complaint to and including Sept. 12, 1974 or until 3 days after the answer of federal defts. (FIAT)(N) Smith, J.
Sept	9	STIPULATION enlarging time of federal defts. to respond to pltfs. amended complaint

for an additional 5 days to and including 9-7-74. (FIAT)(N) Smith, J.

Sept. 16 ORDER granting motion of federal defts. for enlargement of time to answer amended complaint to and including Sept. 29, 1974. (N) Smith, J.

Sept 24 NOTICE by federal defts. of submission of additional document; c/m 9-24-74.

Sept 24 ANSWER by deft. #4 to amended complaint; c/m 9-16-74.

Sept 24 FIFTH MOTION by federal deft. Clarence M. Kelley for an Order modifying this Court's Order of April 1, 1974 and supporting points and authorities; attachment; c/m 9-24-74.

Sept 25 ANSWER by deft. #14, Jeb Stuart Magruder to complaint and amended complaint; c/m 9-24. Appearance of James J. Bierbower as attorney for deft.

Sept 30 MOTION by pltfs. for leave to file second amended complaint; P&A's; exhibit; c/m 9-30-74.

Sept 30 ANSWER by defts. #2, 3, 4, 1, 5, 6 and Kelley to amended complaint; c/m 9-30

Oct 1 ORDER granting federal deft. Clarence M. Kelley's motion for modification of Court's Order of April 1, 1974; permitting deft. to answer pltfs. interrogatories dated August 8, 1974 by pltfs. (N) Smith, J.

Oct 2 STIPULATION dismissing action against deft. Alexander P. Butterfield with prejudice; each party to bear his own costs. "Let this be filed". (N) (Signed 10-2-74) Smith, J.

Oct 3 CERTIFICATE of additional service of Stipulation of Dismissal on 10/2/74.

Oct 3 ANSWER of defendant #2, in his individual capacity, to the complaint; c/m 10-2-74. App. Plato Cacheris.

Oct 8 ANSWER by deft. H. R. Haldeman in his individual capacity to the complaint c/m 10-7-74.

Oct 10 MOTION by federal defts. for an enlargement of time to respond to the pltfs. motion for leave to file second amended complaint; c/m 10-10-74.

Oct 16 MOTION by deft. John N. Mitchell for an enlargement of time; c/m 10-15.

Oct 15 ORDER granting federal defts. motion for enlargement to time to respond to pltfs. motion for leave to file second amended complaint to and including October 20, 1974. (N) Smith, J.

Oct 18 MOTION by pltfs. for an Order requiring search for and production of additional materials; P&A's; affidavit of Walter Slocombe; exhibit A; exhibit B; exhibit C; exhibit D; exhibit E; exhibit F; G, H,I; c/m 10-18.

Oct 18 ORDER granting deft. John N. Mitchell motion for enlargement of time to respond to pltfs. motion for leave to file second amended complaint to and including Oct. 20, 1974. (N) Smith, J.

Oct 22 NOTICE by pltfs. to take deposition of Alexander M. Haig; c/m 10-22-74.

Oct 22 MOTION by pltfs. for an Order in connection with taking depositions of Alexander M. Haig and other defts. and points and authorities in support thereof; c/m 10-22-74.

Oct 22 ORDER granting pltfs. leave to file second amended complaint. (N) Smith, J.

Oct 22 SECOND amended complaint changing caption by pltfs.

Oct 23 ORDER allowing Ward and Paul, Inc. to take the deposition of General Haig in Washington, D.C. pursuant to specific directions in Court Order dated 4-1-74. (N) Smith, J.

Nov 1 STIPULATION for enlargement of time within which federal defts. may respond to pltfs. motion for an Order requiring search for and production of additional materials an additional 10 days up to and including 11-8-74, APPROVED. (N) Smith, J.

Nov. 7 APPEARANCE of Ross O'Donoghue as counsel for deft. H. R. Haldeman. CD/N

Nov 11 STIPULATION permitting federal defts. additional 7 days up to and including 11-15-74 to respond to pltfs. motion for an Order requiring search for and production of additional materials. (N) Smith, J.

Nov. 15 RESPONSE by federal defts., Kissinger, Haig, and Kelly to pltfs. motion for an Order requiring a search for and production of additional materials; c/m 11-15-74.

Nov 15 MOTION by defts. #3, 4, 5, and 7 in their former official capacity for an enlargement of time; c/m 11-15-74.

Nov 18 SUMMONS, copy (1) and copy (1) of second amended complaint issued to deft. #2, Richard M. Nixon: ser. 12-12-74

Nov 18 SUMMONS, copy (1) and copy (1) of second amended complaint issued to deft. #8, Robert C. Mardian: N.S.

Nov 18 MOTION by Attorney General to permit *in camera* submission of motion of the Department of Justice to withdraw.

Nov 18 ORDER permitting *in camera* submission of motion of the Department of Justice to withdraw as counsel. (N) Smith, J.

Nov 18 ORDER granting defts. Haldeman, Ehrlichman, Mitchell and Sullivan's motion for enlargement of time to respond to pltfs. motion for an Order requiring a search for and production of additional materials to and including 11-25-74. (N) Smith, J.

Nov 25 DEPOSITION of H. W. William Caming for pltf.

Nov 27 OPPOSITION by deft. #7 to motion of Attorney General to permit the in camera submission; P&A; request for oral argument; c/m 11-26-74.

Nov 27 MOTION by deft. #7 in opposition to in camera motion of Attorney General William B. Saxbe for an order permitting Department of Justice Attorneys to withdraw as counsel of record for deft. #7; request for oral argument; attachment; P&A; c/m 11-26-74.

Dec 2 STIPULATION for enlargement of time within which federal defts. Haldeman, Ehrlichman, Mitchell, and Sullivan may respond to pltfs. motion for an Order requiring search for and production of additional material for 10 days up to and including December 6, 1974. (N) Smith, J.

Dec 6 APPEARANCE of John J. Wilson and Frank H. Strickler as counsel for deft. #4, H. R. Haldeman. CD/N

Dec 6 DEPOSITION of Tod Hullin for pltfs. by certified mail.

Dec 13 MOTION of Richard M. Nixon to quash subpoena duces tecum; P&A's exhibit A; exhibit 1, 2; exhibit B; exhibit C; c/s 12-13-74.

Dec 13 OBJECTION of Philip W. Buchen to the inspection and copying of certain of the materials designated in the Pltfs. subpoena duces tecum; c/m

Dec 18 TRANSCRIPT of proceedings for 12-9-74, pages 1–21. (Rep: R. Weber) Court copy.

Dec 23 LIST of copies made by pltff. pursuant to this Court's April 1, 1974, Order; c/m 12-23-74.

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Jan 2 MOTION by pltfs to enforce subpoena duces tecum; P&A's; exhibit A; exhibit 1, 2; exhibit B; c/s and c/m 12-31-74.

Jan 3 OPPOSITION of pltfs. to motion of Richard M. Nixon to quash subpoena duces tecum; exhibit A and B; c/s 1-3-75.

Jan 3 MEMORANDUM by pltfs. on allegations with respect to deft. #6; c/m 1-3-75.

Jan 3 NOTICE by pltfs. of additional copy made pursuant to this Courts April 1, 1974 Order; c/m 1-3-75.

Jan 7 RESPONSE of Philip W. Buchen to pltfs. motion to enforce subpoena duces tecum and Richard M. Nixon's motion to quash subpoena duces tecum attachments; (2); c/m 1-7.

Jan 7 SUBMISSION by pltfs. of supplemental material in support of pltfs. opposition to motion of Richard M. Nixon to quash subpoena duces tecum; exhibit A; c/m 1-7.

Jan 7 WITHDRAWAL of appearance of Henry E. Peterson, Edward S. Christenbury, Benjamin C. Flannagan and Jonathan B. Smith as counsel for deft. John M. Mitchell and appearance of Plato Cacheris and William G. Hundley as counsel for said deft. CD/N

Jan 9 APPEARANCE of Henry Jones as attorney for deft. #4. CD/N

Jan 9 WITHDRAWAL of John J. Wilson and Frank H. Strickler as attorneys for deft. #4. CD/N

Jan 9 MOTION of deft. Richard Nixon to quash subpoena heard and taken under advisement. (Rep: R. Weber) Smith, J.

Jan 16 MEMORANDUM of the Attorney General in re: 28 USC 516; c/m 1-15.

Jan 17 TRANSCRIPT of proceedings of January 9, 1975, pages 1-37. (Rep: R. Weber); Court copy.

Jan 20 ORDER denying without prejudice in camera motion of Attorney General William B. Saxbe for an Order permitting Dept of Justice attorneys to withdraw as counsel of record. (N) Smith, J.

Feb 7 STIPULATION extending time for Federal defts. to respond to Second Amended Complaint of pltfs. to & including Feb 24, 1975, approved. (N) Smith, J.

Feb 10 MOTION of Richard M. Nixon for enlargement of time to respond to Second Amended Complaint of pltfs and memorandum of points & authorities in support thereof; c/m 2-10-75.

Feb 11 SUMMONS, copy (1) and copy (1) of second amended complaint issued to deft. #8, Robert C. Mardian.: serv. 2-25.

Feb 11 STIPULATION for extension of time within which deft. Chesapeake and Potomac Telephone Company may answer in response to pltfs. second amended complaint extended to and including 2-24-75, APPROVED. (N)Smith, J.

Feb 13 ORDER extending time within which deft. Nixon may respond to pltfs. second amended complaint enlarged for an additional 30 days to and including 3-12-75. (N) Smith, J.

Feb 24 ANSWER by defts. #1, 6, 7, and 9 to second amended complaint; c/m 2-24.

Feb 24 ANSWER by deft. #12 to second amended complaint; c/m 2-24.

Feb 25 ANSWER by deft. #14 to second amended complaint; c/m 2-24.

Mar 12 SUGGESTION of dismissal as to deft. Richard M. Nixon; c/m 3-12; P&A's; table of cases and authorities; attachments (5).

Mar 12 MOTION by deft. Richard Nixon for extension of time within which to answer or otherwise plead; P&A's; c/m 3-12.

Mar 19 ANSWER by John N. Mitchell, deft. #2, to second amended complaint; c/m 3-17.

Mar 19 STIPULATION extending time for deft. H.R. Haldeman to respond to pltfs. second amended complaint to and including 3-21-75. (N)Smith, J.

Mar 20 ORDER for extension of time for an additional 30 days up to and including April 11, 1975 within which deft. Richard M. Nixon may respond to pltfs. amended complaint. (N)Smith, J.

Mar 24 WITHDRAWAL of appearance of Henry E. Petersen, Edward S. Christenbury, Benjamin C. Flannagan and Jonathan B. Smith as counsel for deft. H.R. Haldeman and enter appearance of John J. Wilson and Frank H. Strickler as counsel for deft. CD/N

Mar 24 WITHDRAWAL of appearance of Henry E. Petersen, Edward S. Christenbury, and Jonathan B. Smith as counsel for deft. H.R. Haldeman; and enter appearance of John J. Wilson and Frank H. Strickler as counsel for deft. CD/N

Mar 24 ANSWER by deft. H.R. Haldeman to second amended complaint; c/m 3-21.

Apr 4 DEPOSITION of Horace R. Hampton for pltfs. published and filed.

Apr 10 ANSWER by deft. Robert Mardian to second amended complaint; c/m 4-8.

Apr 11 ANSWER by deft. Richard Nixon to second amended complaint; c/m 4-11. Appearance of William G. Hundley and Cary Mark Feldman as attorneys for deft.

Apr 18 DEPOSITION of Earl Connor for pltfs. published and filed.

Apr 23 NOTICE by pltfs. to take deposition of Cartha DeLoach; cc/4-22.

Apr	30	DEPOSITION of William Earl Fisher for pltfs. published and filed.
May	5	APPEARANCE of Hope Eastman as attorney for pltfs.; c/m 5-2.
May	6	CHANGE of address of movants. CD/N (unsigned)
May	8	NOTICE by pltfs. to take deposition of Robert C. Mardian.
May	13	MOTION by deft. Haldeman for leave to inspect and to copy logs of telephone conservations; memorandum of P&A's; c/m 5-12.
May	15	NOTICE by pltfs. of rescheduled deposition of Robert H. Hanes.
May	16	NOTICE by pltfs. of rescheduled deposition of William C. Sullivan.
May	19	NOTICE by pltfs. of rescheduled deposition of Cartha DeLoach.
May	19	NOTICE by pltfs. of rescheduled deposition of Richard M. Nixon.
May	29	NOTICE by pltfs. to take rescheduled deposition of Robert C. Mardian; c/m 5-27-75.
June	2	DEPOSITION of Ernest H. Belter for pltfs. published and filed; exhibit 1.
June	3	REQUEST by pltfs. for production of documents.
June	11	APPEARANCE of Robert M. Adler as attorney for deft. John Ehrlichman. CD/N
June	12	DEPOSITION of James J. Gaffney for pltfs.
June	16	NOTICE by pltfs. of continuance of deposition.
Jun	18	DEPOSITION of James D. Barnhardt for pltfs.; exhibit 1, published and filed.
Jun	18	DEPOSITION of Courtland J. Jones for pltfs.; exhibit 1 published and filed.

Jun 18 FIRST set of interrogatories by deft. The Chesapeake and Potomac Telephone Co. to pltfs.; attachment; c/m 6-18.

Jun 23 MOTION by pltfs. for leave to file late in opposition to deft. Haldeman motion for leave to inspect and to copy logs of telephone conversations; c/m 6-13.

Jun 23 APPEARANCE of Lawrence H. Schwartz as attorney for deft. John Erlichman CD/N

** July 3 MOTION of deft. #2, Richard M. Nixon, for a protective order; memorandum of P&A's; exhibit A and B; c/m 7-3.

July 7 STIPULATION extending time for federal defts. to respond to pltfs. request for production of documents for an additional fifteen days up to and including 7-15-75. (FIAT) (N)Smith, J.

July 3 NOTICE by pltfs. to take deposition of William H. Quinlan, Jr.; attachment; c/m.

July 3 NOTICE by pltfs. to take deposition of Henry A. Kissinger; c/m.

July 3 NOTICE by pltfs. to take deposition of Jeanne W. Davis; attachments (2); c/m.

July 7 STIPULATION CONTINUING return date for subpoena duces tecum served upon Jeanne W. Davis and William H. Quinlan, Jr. for an additional eight days up to and including July 15, 1975. (FIAT) (N) Smith, J.

July 7 STIPULATION enlarging and extending time for pltfs. to respond to deft. Chesapeake and Potomac Telephone Company's interrogatories up to and including Sept. 16, 1975. (FIAT) (N) Smith, J.

July 8 MOTION by deft. Nixon to dismiss; c/m 7-8.

July 9 DEPOSITION of Alexander N. Haig for pltfs. filed and published; exhibits #1-24.

July 16 OBJECTION of Jeanne W. Davis to the inspection and copying of certain materials des-

ignated in the pltfs. subpoena duces tecum; c/s 7-1

July 16 OBJECTION of William H. Quinlan, Jr. to the inspection and copying of certain of the material designated in the pltfs. subpoena duces tecum; c/s 7-16.

July 16 RESPONSE of federal defts. to pltfs. request for production of documents; c/s 7-16.

July 18 MOTION of federal deft., Clarence M. Kelley, for an Order modifying this Court's Order of April 1, 1974 and supporting points and authorities; c/s 7-18.

July 21 WITHDRAW the appearance of John F. Dienelt as counsel for pltf. (fiat) Smith, J.

July 21 MOTION of William S. Frates, Esq. to withdraw appearance as counsel for deft., John Ehrlichman; c/m 7-9-75.

July 21 ORDER granting federal deft. Kelly's request for modification of Court Order entered April 1, 1974 permitting the deft. to make available to selected staff members of the Senate Select Committee at FBI all documents impounded by this Court pursuant to its Order of June 23, 1973 except for the logs of the conversations of the pltfs.; permit staff members to make notes of the contents of such documents for submission to the Select Committee. (N) Smith, J.

July 22 ORDER granting motion of William S. Frates, attorney, to withdraw his appearance as counsel for deft. John Ehrlichman. (N) Smith, J.

July 29 REQUEST by pltfs. for production of documents; c/m 7-25.

July 29 APPEARANCE of Richard E. Timbie as counsel for pltfs. CD/N

July 31 MOTION of pltfs. for an Order to permit public filing of their opposition to deft. Nixon's motion for a protective order; opposition of

pltfs. to motion of deft. Nixon for a protective order; table of authorities; exhibit A,B,C, and D; c/m 7-31.

Aug 4 STIPULATION that discovery of deft. Henry Kissinger will proceed initially by written interrogatories to be followed by deposition upon oral examination; deposition of said deft. now notice for Sept. 11, 1975 is continued until a mutually agreeable time and place. (FIAT)(N) Smith, J.

Aug 7 ORDER denying motion of deft. Haldeman for leave to inspect and copy certain logs of telephone conversations. (N) Smith, J.

Aug 15 DEPOSITION of Jeb Stuart Magruder for pltfs. published and filed.

Aug 19 RESPONSE by federal defts. to pltfs. second request for production of documents; affidavit of Hunter E. Helgeson; c/s 8-18.

Sept 9 ORDER modifying this Court's Order of April 1, 1974 to allow pltfs. to file their opposition to deft. Nixon's motion for a protective order be a matter of public record. (N) Smith, J.

Sept 10 NOTICE by federal defts. of submission of additional documents; c/s 9-10

Sept 17 STIPULATION extending time within which pltfs. may respond to deft. Chesapeake and Potomac Telephone Company's interrogatories up to and including September 19, 1975. (N) Smith, J.

Sept 22 ANSWERS by pltfs. to first set of interrogatories by deft. #12; c/m 9-19.

Sept 22 MOTION of deft., Richard M. Nixon, for a protective order (to quash taking of deposition) heard and taken under advisement. (Rep: D. Copeland) Smith, J.

Sept 24 MEMORANDUM AND ORDER denying deft., Richard M. Nixon's motion for protec-

tive order conditioned upon the deposition of Nixon taking place at a location at or near his home. (N) Smith, J.

Oct 3 DEPOSITION of Cartha D. DeLoach for the pltffs.

Oct 3 DEPOSITION of John N. Mitchell for the pltffs.

Oct 6 MOTION by deft. #2, Richard M. Nixon, for reconsideration of motion for a protective order; memorandum of P&A's; c/m 10-6.

Oct 7 APPEARANCE of Jerry J. Berman as attorney for pltfs. CD/N

Oct 7 FIRST set of interrogatories by federal defts. to pltfs.; c/s 10-7.

Oct 10 OPPOSITION by pltfs. to deft. Nixon's motion for reconsideration of this Court's Order denying motion for protective order; c/m 10-9.

Oct 10 FIRST set of interrogatories by pltfs. to deft. #1; c/s 10-10.

Oct 17 REPLY of deft. Nixon to pltfs. opposition to motion for reconsideration c/m 10-16.

** Oct 28 MOTION of deft. Clarence M. Kelley for an order modifying this court's order of 4-1-74 and supporting points and authorities; c/s 10-28-75.

Oct 31 STIPULATION extending time until 10-31-75 for the pltfs. to submit the answers to C&P's first six questions of the first set of interrogatories and extending time to 12-31-75 for pltfs. to file a motion for summary judgment for the remaining questions. (N)(FIAT)Smith, J.

* Oct 29 ORDER denying motion of deft. Nixon for reconsideration. (N) Smith, J.

Oct 29 ORDER modifying Court's Order entered April 1, 1974 to permit deft. to make available to selected staff members of the House Select Committee at the offices of the FBI, all of the

documents impounded by this Court pursuant to Order of June 28, 1973, except for the logs of the conversations of the pltfs. and to permit staff members to make notes of the contents of such documents for submissions to the members of the Select Committee. (N) Smith, J.

Nov 7 STIPULATION extending time to and including 12-10-75 for federal deft. Henry A. Kissinger, to respond to the pltfs. interrogatories. (N)(FIAT) Smith, J.

Nov 12 STIPULATION extending time to and including 12-8-75 for pltfs. to respond to the federal defts. first set of interrogatories. (N)(FIAT) Smith, J.

Dec 1 DEPOSITION of John Ehrlichman for pltfs. published and filed; exhibits exhibit 1,2.

Dec 5 NOTICE by pltfs. to take deposition of Richard M. Nixon; c/s 11-26.

Dec 8 ANSWERS by pltfs. to federal defts. first set of interrogatories; c/s 12-8.

Dec 9 MOTION by federal deft., Henry A. Kissinger, for extension of time; memorandum of P&A's; c/s 12-9.

Dec. 10 ORDER granting federal deft. Kissinger's motion for extension of time within which to respond to pltfs. interrogatories extension to and including 1/10/76. (N) Smith, J.

Dec. 19 NOTICE by pltf. to take deposition of Richard M. Nixon rescheduled for January 15 and 16, 1976; c/m 12-17-75.

Dec 22 WITHDRAWAL of Walter Hellerstein as attorney for deft. #15. (FIAT) CD/N Smith, J.

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Jan 2 APPEARANCE of Homer E. Moyer, Jr. as attorney for deft. #15. CD/N

Jan 5 NOTICE by pltfs. to take deposition of H.R. Haldeman; c/s 1-2.

Jan 7 APPEARANCE of Mark D. Rosenbaum of ACLU Foundation of Southern California as local counsel for pltfs. in the Central District of California; c/m 12-22. (FIAT) Smith, J.

Jan 12 RESPONSES by federal deft., Kissinger, to pltfs. first set of interrogatories; c/s 1-12.

Jan 22 MOTION by federal defts. to compel answers to interrogatories; memorandum of P&A's; table of cases and authorities; c/m 1-22.

Feb 11 NOTICE by pltfs. to take deposition of Henry A. Kissinger; c/m 2-11.

Feb 12 SUPPLEMENTAL memorandum by pltfs. in support of motion to enforce subpoena duces tecum; c/m 2-11.

Feb 12 REQUEST by pltfs. pursuant to Rule 34, FRCP, and the Court's Order of April 1, 1974 for production of additional documents; c/m 2-11.

Feb 17 APPEARANCE of Edward S. Christenbury and Elizabeth Gere Whitaker as attorneys for defts. Richard M. Nixon, John N. Mitchell, H.R. Haldeman, and Robert C. Mardian. CD/N

Feb 18 SECOND set of interrogatories to pltfs. by federal defts.; c/m 2-18.

Feb 18 REQUESTS for admissions by federal defts.; c/m 2-18.

Feb 20 STIPULATION for extension of time within which pltfs. may answer the federal defts. motion to compel answers to interrogatories is extended pending negotiations concerning additional answers. Federal defts. may terminate this extension at any time on 10 days notice, approved. (N) Smith, J.

Mar 10 NOTICE by federal defts. except Ehrlichman of in camera filing of deposition of Richard M.

Nixon submitted to the Court *in camera* with the exception of page 45 (line 28 beginning "It . . .), pages 46–49 and page 50 (through line 7, ending ". . . no initiative") submitted in sealed form.

Mar 10 DEPOSITION of Richard M. Nixon taken on behalf of pltfs. taken on 1-15-76.

Mar 10 DEPOSITION of H.R. Haldeman taken on behalf of pltfs. taken on 1-16-76.

Mar 12 RESPONSE by federal defts. to pltfs. request for additional production of documents; c/m 3-12.

Mar 19 OPPOSITION of Philip W. Buchen to pltfs. supplemental memorandum in support of motion to enforce subpoena duces tecum; corrections to affidavit of Mary M. Filippini; affidavit of Mary M. Filippini; exhibit A; exhibit B; affidavit of Barry N. Roth; exhibit A; exhibit B; c/m 3-19.

Mar 24 APPEARANCE of David C. Acheson for all defts. except C&P Telephone Co.; c/m 3-24.

Mar 26 SUPPLEMENTAL notice by pltfs. to take deposition of Henry A. Kissinger; c/s 3-25.

Mar 26 ANSWERS by pltfs. to federal defts. second set of interrogatories; c/s 3-25.

Apr 23 WITHDRAWAL of Homer E. Moyer, Jr. as attorney for deft. #15. CD/N

Apr 27 STIPULATION granting counsel to review the deposition of Secretary of State, Henry A. Kissinger, approved. (N) Smith, J.

Apr 27 RESPONSE by pltfs. to federal defts. request for admissions; c/s 4-28.

May 11 APPEARANCE of James J. Bierbower as counsel for Jeb Stuart Magruder; c/m 5-10.

May 11 REQUEST by federal defts. except Ehrlichman that pursuant to paragraph 9 of Court's Order of 4-1-76 Monroe Leigh, Legal

Advisor, State Department and Michael Sandler, attorney, Office of Legal Advisor, State Department shall have access to documents except the logs to assist in preparation of the above litigation. "Let this be filed". c/m 5-7 Smith, J.

May 12 APPEARANCE of Togo D. West, Jr. as counsel for deft. The Chesapeake and Potomac Telephone Company.

May 18 FURTHER responses by pltfs. to federal defts. first set of interrogatories c/m 5-14. "Let this be filed". Smith, J.

May 21 MOTION by federal deft., Clarence M. Kelley, to classify/reclassify certain documents impounded by the Court; memorandum of P&A's; c/m 5-21.

May 21 NOTICE by federal defts. except Ehrlichman of in camera filing of the transcript of testimony of Dr. Henry A. Kissinger with page 33 submitted to the Court *in camera* in sealed form; c/m 5-21.

May 21 DEPOSITION of Henry A. Kissinger for pltfs. taken on March 30, 1976.

May 26 NOTICE by federal defts. except Ehrlichman of in camera filing of exhibits to the depositions of Richard M. Nixon and H.R. Haldeman; c/m 5-26.

May 27 NOTICE by federal defts. except Ehrlichman to take deposition of Ina Halperin; c/m 5-27.

May 27 RENEWED motion by federal defts. to compel answer to interrogatories; memorandum of P&As; c/m 5-27.

May 28 APPEARANCE OF R. Joseph Sher as counsel for the Federal Defendants John Ehrlichman.

June 4 OPPOSITION by pltfs. to federal defts. renewed motion to compel answer to interrogatories; c/m 6-3.

June 10 ORDER filed 6-8-76 allowing an agent of the FBI in the presence of a designated Court employee, classify or reclassify documents listed in federal deft. Kelley's motion impounded the Court. Smith, J.

June 11 CORRECTION of pltfs. further responses to federal defts. first set of interrogatories; c/m 6-11.

June 11 RESPONSES by pltfs. to federal defts. supplemental questions on first set of interrogatories; c/m 6-11.

June 15 MOTION by deft. #4 for summary judgment; memorandum of P&A's; statement; c/m 6-15. Appearance of Lawrence H. Schwartz.

June 18 APPEARANCE of Larry L. Gregg as counsel for federal defts. except Ehrlichman; c/m 6-18.

Jun 21 SIGNATURE of Morton H. Halperin to pltfs. responses to federal defts. supplemental questions on first set of interrogatories; c/m 6-21.

Jun 25 MOTION by federal defts. to extend discovery; memorandum of P&A's; c/m 6-25.

Jun 28 MEMORANDUM by pltfs. in opposition to federal defts. motion to extend discovery; c/m 6-23.

Jun 29 MOTION by defts. to compel taken under advisement pending further efforts of counsel and further hearing July 27, 1976 for cross-motions for summary judgment to go forward as set. (Rep: D. Copeland) Smith, J.

June 30 STIPULATION that pltfs. subpoena duces tecum served on Philip W. Buchen on 12-3-74 insofar as it seeks certain documents from among the presidential materials of the Nixon Administration and motions relating to quashing and enforcement thereof shall be deemed withdrawn upon completion of terms and conditions which have been agreed to by the parties to this stipulation for the purpose

of satisfying pltfs. request for discovery of relevant items from among said materials, approved. (N) Smith, J.

Jul 1 SUPPLEMENTAL memorandum in support of federal deft. Nixon's motion to dismiss; exhibit A; c/m 7-1.

Jul 2 STIPULATION allowing the respective representatives of the National Sec. Council and the Dept. of Defense provide counsel for the federal defts. and their clients copies of the documents so transferred to the extent permitted by pertinent security regulations. No document transferred shall be removed from the Archives. (N) Bryant, J.

July 8 DEPOSITION of Morton H. Halperin for federal defts.; Appendix; exhibit 1; exhibit 2; exhibit 3; exhibit 4; exhibit 5 and exhibit 6.

July 9 STIPULATION that the memoranda of points and authorities in support of motions for summary judgment shall not exceed 100 pages; federal defts. shall be permitted to file their memorandum of points and authorities in support of summary judgment on "8½ × 11" paper. (FIAT) (N) (c/m 7-8-76) Gesell, J.

July 9 MOTION by federal defts. for summary judgment; statement; memorandum of P&A's; exhibits to federal defts. motion for summary judgment; exhibit 1; exhibit 2; exhibit 3; exhibit 4; exhibit 5; exhibit 6; exhibit 7; exhibit 8; exhibit 9; exhibit 10; exhibit 11; attachment 1; exhibit 12; exhibit 13; exhibit 14; exhibit 15; exhibit 16; exhibit 17; exhibit 18; exhibit 19; exhibit 20; exhibit 21; exhibit 22; exhibit 23; exhibit 23; c/m 7-9.

July 9 MOTION by pltfs. for an Order to permit public filing of their motion for summary judgment against the individual defts.; exhibit; memorandum of law; table of contents; table of cases

and authorities; memorandum of law; statement of material facts; c/m 7-9.

July 12 MOTION by pltfs. for summary judgment against deft. #12; memorandum; statement; c/m 7-12.

July 12 MOTION by deft. #12 for summary judgment; memorandum; table of contents; table of citations; exhibit A; statement; c/m 7-12.

July 14 ORDER filed 7-12-76 amending Court's Order dated April 1, 1976 permitted pltfs. motion for summary judgment against individual defts. be filed as a matter of public record. (N) Smith, J.

July 13 MOTION by pltfs. for summary judgment against individual defts.; memorandum of law; table of contents; table of cases and authorities; statement; c/m 7-9.

July 12 STIPULATION allowing copy of transcript be treated as the deposition of Mr. Sullivan and FURTHER agreed that Mr. Sullivan at any time prior to the trial make such formal corrections, NOT CHANGING THE SUBSTANCE OF THE DEPOSITION TESTIMONY AS HE MAY DESIRE. (FIAT)(N). Smith, J.

July 13 COPY of deposition of William G. Sullivan.

July 19 RESPONSE by Federal defts. to statement of material facts by pltfs.; c/s 7-19-76.

July 19 MOTION of Federal defts. for an order to permit public filing of opposition to motion by pltfs. for summary judgment; c/s 7-19-76.

July 19 MEMORNADUM by pltfs. of Points and Authorities in opposition to motion by deft. Ehrlichman for summary judgment; Statement of genuine issues; c/m 7-19-76.

July 19 MEMORANDUM of Law by pltfs. in opposition to suggestion for dismissal as to Richard Nixon and in opposition to motion of Richard Nixon to dismiss; Exhibit A; c/m 7-19-76.

July 19 MOTION by Federal defts. for leave to file an opposition to motion by pltfs. for summary judgment in excess of 35 pages; c/s 7-19-76.

July 19 MOTION by pltfs. for an order to permit public filing of Memorandum in opposition to Federal defts. motion for summary judgment; c/m 7-19-76.

July 19 MEMORANDUM by pltfs. of Points and Authorities in opposition to motion by Federal defts. for summary judgment; Table of Contents; Table of Cases; Exhibit 1 w/Exhibits A thru M; Exhibits 2 & 3; Affidavit of Morton H. Halperin; c/m 7-19-76. (fiat) SMITH, J.

July 20 ORDER modifying Court's order dated April 1, 1974 permitting pltfs. Memorandum of Points and Authorities and attachments in opposition to Federal defts. Motion for summary judgment be filed as a matter of public record. (fiat)(N) SMITH, J.

July 19 STATEMENT by pltfs. of genuine issues in response to Federal Defts. Statement of material facts; c/m 7-19-76.

July 19 MEMORANDUM by deft. The Chesapeake and Potomac Telephone Company in opposition to motion by pltfs. for summary judgment; Appendices I & II; Exhibits 1 & 2; c/m 7-19-76.

July 19 RESPONSE by deft. The Chesapeake and Potomac Telephone Company to Statement of material facts by pltfs.; c/m 7-19-76.

July 20 ORDER granting federal defts. motion for leave to file an opposition in excess 35 pages. (N) Smith, J.

July 20 OPPOSITION by federal defts. to pltfs. motion for summary judgment; table of contents; table of cases and authorities.

Jul 20 MEMORANDUM by pltfs. in opposition to deft. #12's motion for summary judgment; statement; c/m 7-19.

July 23 REPLY by federal deft. Nixon to pltfs. opposition to suggestion for dismissal as to deft. and in opposition to motion of deft. to dismiss; c/m 7-23.

July 23 REPLY by federal defts. to pltfs. opposition to motion for summary judgment; table of contents; table of cases; exhibit A; c/m 7-23.

July 23 REPLY by pltfs. to federal defts. opposition to motion for summary judgment against individual defts.; c/m 7-23.

July 23 STATEMENT by pltfs. with respect to motion of federal defts. for an order to permit public filing of their opposition to pltfs. motion for summary judgment; c/m 7-23.

July 26 REPLY memorandum by deft. #12; Appendix I; c/m 7-26.

July 26 REPLY by deft. #4 to pltfs. opposition to motion for summary judgment; c/s 7-26.

July 27 CROSS-MOTIONS for summary judgment argued and taken under advisement. (Rep: R. Weber) Smith, J.

Aug 3 MEMORANDUM by pltfs. in response to reply to pltfs. opposition to John D. Ehrlichman's motion for summary judgment; exhibits 1-5; c/m 8-3.

Sept 9 APPEARANCES of Robert L. Keuch, George W. Calhoun, Edward S. Christenbury, Larry L. Gregg and Elizabeth G. Whitaker as counsel for the deft. #4 John Ehrlichman; c/m 8/30/76.

Nov 17 APPEARANCE of D. Jeffrey Hirschberg as attorney for federal defts.; c/m 11-17-76.

Dec 16 OPINION. (N) SMITH, J.

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Jan 7 STIPULATION within which the parties may submit proposed orders implementing the

Court's opinion of Dec. 6, 1976 extended to January 14, 1977, approved. (N) Smith, J.

Jan 13 NOTICE by pltfs. of change of address of attorney; c/m 1-12-77.

Jan 31 ORDER filed 1-28-77 Richard M. Nixon's motion to dismiss and granting defts. Henry A. Kissinger, John Ehrlichman, Alexander Haig, William Sullivan, Clarence Kelley and Robert C. Mardian summary judgment as to all claims; C&P Telephone Company's motion for summary judgment granted; second amended complaint as to deft. Jeb S. Magruder dismissed with prejudice; defts. Nixon, Mitchell and Haldeman granting summary judgment for compensatory damages for violation of their Fourth Amendment rights and counsel to report to the Court at 10:00 a.m. on March 15, 1977. (See Order for further detail.) (N)Smith, J.

Feb 8 WITHDRAWAL of appearance of Elizabeth G. Whitaker as counsel for federal defts. CD/N c/m 2-8-77.

Feb 8 APPEARANCE OF LUBOMYR M. JACHNYCKY as counsel for the federal defts.; x/m 2-7-77. CD/N

Feb 9 MOTION by pltfs. to amend judgment; c/m 2-8-77.

Feb 23 WITHDRAWAL of appearance of Walter Slocombe as counsel for pltfs. CD/N

Mar 15 STATUS CALL. Pltf. will submit brief as to damages and question of injunctive and declaratory relief; defts. given until 4-13-77 to respond. (Rep: D. Copeland) Smith, J.

Mar 15 REPORT to the Court by pltfs. and preliminary memorandum in support of declaratory and injunctive relief; c/s 3-15-77.

Mar 16 APPEARANCE of George W. Calhoun for defts; c/m 3-11-77.

Mar 16 TRANSCRIPT OF PROCEEDINGS, 7-27-76; courts copy; pages 1-97; (Rep: R. Weber).

Mar 21 WITHDRAWAL of appearance of David E. McGiffert as counsel for deft. #1 and enter the appearance of Michael Boudin; c/m 3-10-77. CD/N

Mar 30 POST-JUDGMENT memorandum by pltfs. in support of compensatory and punitive damages; c/m 3-30-77.

Apr 4 WITHDRAWAL of Togo D. West as attorney for deft. #15 and enter appearance of Donna M. Murasky; c/m 4-4-77. CD/N

Apr 8 APPEARANCE of Mark H. Lynch as attorney for pltfs. CD/N

Apr 12 MEMORANDUM of deft. #12 in response to pltfs. memoranda respecting relief; c/m 4-12-77. Appearance of Michael Boudin.

Apr 13 MEMORANDUM of federal defts. on damages and equitable relief; c/m 4-13-77.

Apr 22 STIPULATION for extension of time within which the pltfs. reply to federal defts. memorandum on damages and injunctive relief be extended to May 4, 1977. (FIAT)(N) Smith, J.

May 4 REPLY by pltfs. to federal defts. memorandum on damages and equitable relief; c/m 5-4-77.

May 6 WITHDRAWAL of appearance on Donna M. Murasky as counsel for deft. #15 C&P Telephone Co.; c/m 5-6-77.

May 24 CHANGE of address of Mark H. Lynch, attorney for pltf. CD/N

May 26 SUPPLEMENTAL report by pltfs. to the Court on declaratory and injunctive relief; c/s 5-25-77.

Aug 5 MEMORANDUM OPINION AND ORDER that defts. Nixon, Haldeman and Mitchell are liable jointly and severally to each of the pltfs. for nominal damages in the amount of One Dollar ($1.00) and further all defts. are permanently enjoined from making any use or disclosure of the intercepted wire communications of the pltfs. (See order for further details.)(N) Smith, J.

Aug 9 MOTION of deft. #9 for an order modifying this Court's order of Aug. 5, 1977; memorandum; attachments (3); c/m 8-9-77.

Sept 6 NOTICE of appeal by pltfs. from Judgments of 5-5-77 and 1-28-77. $5.00 paid and credited to U.S. Copies mailed to Jonathan B. Smith, Benjamin Flannagan, Edward S. Christenbury, D. Jeffrey Hirschberg, James Bierbower, and Michael Boudin.

Oct 3 NOTICE of appeal by federal defts. Nixon, Mitchell, and Haldeman from judgments of 1-28-77 and 8-5-77. Copies mailed to Joseph E. Case, Michael Boudin, and John H.F. Shattuck. Govt. no fee. Copy mail also to James Bierbower and Lawrence H. Schwartz.

Nov 14 RECORD on appeal delivered to USCA; receipt acknowledged. (77-2014 and 77-2015)

Dec 8 ORDER filed on 12-7-77 modifying this Court's order entered August 5, 1977 allowing federal deft. Kelley to copy each of the specific documents to be released to Ellsberg. (See order for details. (N) Smith, J.

Dec 15 RESPONSE of pltfs. to Court's order of 10-7-77; c/m 12-15-77.

Dec 21 STIPULATION amending notices of appeal filed by the pltfs. 9-6-77 by federal defts., Nixon, Mitchell & Haldeman on Oct 3, 1977 from judgments entered on Jan 28, 1977 and Aug 5, 1977 to include the final judgment sub-

sequently entered and said notices shall apply to the final judgment with the same force and effect as they applied to the judgments of Jan 28, 1977 and Aug 5, 1977 otherwise said notices of appeal remain in effect. (fiat) (N) SMITH, J.

Dec 27 FINAL JUDGMENT filed on 12-21-77 denying motion of deft. Richard M. Nixon to dismiss; granting summary judgment as to all claims as to defts, Henry A. Kissinger, John Enrlichman, Alexander Haig, William Sullivan, Clarence Kelley and Robert C. Mardian; granting motion of deft. Chesapeake & Potomac Telephone Co. for summary judgment; denying motion of pltfs. for summary judgment as to deft. Potomac Telephone Co. and dismissing with prejudice second amended complaint as to said deft.; dismissing second amended complaint with prejudice as to deft. Jeb S. Magruder; granting summary judgment as to defts. Richard M. Nixon, John N. Mitchell and H.R. Haldeman as to pltfs. claim for relief under 18 USC 2502: granting pltfs. summary judgment for violation of their 4th amendment rights from defts. Richard M. Nixon, John N. Mitchell, and H.R. Haldeman: defts. Nixon, Haldeman and Mitchell are liable, jointly and severally, to each of the pltfs. for nominal damages in the amount of One Dollar ($1.00) and dissolving Court's April 1, 1974 protective order. (See order for further details.)(Signed 12-20-77)(N)

Smith, J.

Dec 27 MEMORANDUM filed on 12-21-77. (N)(FIAT) Smith,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

SECOND AMENDED COMPLAINT

MORTON H. HALPERIN and INA HALPERIN, 8215 Stone Trail Drive, Bethesda, Maryland, suing individually and on behalf of their minor children, DAVID HALPERIN, MARK HALPERIN and GARY HALPERIN,

Plaintiffs,

v.

HENRY A. KISSINGER,
2527 Waterside Drive, NW
Washington, D.C.

RICHARD M. NIXON,
Presidential Compound
San Clemente, California

JOHN N. MITCHELL
1030 Fifth Avenue
New York, New York

H. R. HALDEMAN
2402 R Street, NW
Washington, D.C.

JOHN EHRLICHMAN
330 Chesapeake Drive
Great Falls, Virginia

ALEXANDER HAIG
Fort McNair
Washington, D.C.

WILLIAM C. SULLIVAN
2810 64th Avenue
Cheverly, Maryland

ROBERT C. MARDIAN
2323 North Central Avenue
Phoenix, Arizona

CLARENCE KELLEY
Director of the FBI
10th and Pennsylvania Avenue
Washington, D.C.

JEB STUART MAGRUDER
Federal Penitentiary
Allenwood, Pennsylvania

JOHN DOE, RICHARD ROE, and
other unknown agents of the
FBI and

JAMES POE, RICHARD DOE,
and other unknown employees
of the Executive Department
and other agencies of government

CHESAPEAKE AND POTOMAC TELEPHONE CO.
725-13th Street, NW
Washington, D.C.

Defendants.

JURISDICTION

1. This action arises under Title 18, United States Code, § 2520 and under the First, Fourth and Ninth Amendments to the United States Constitution. The jurisdiction of this Court is based upon Title 28, United States Code, § 1331(a) and 1343(4), Title 18, United States Code § 2520, and the First, Fourth and Ninth Amendments to the Constitution. The matter in controversy, exclusive of interests and costs, exceeds $10,000.

PARTIES

2. Plaintiff MORTON H. HALPERIN is a citizen of the United States and a resident of the State of Maryland. He is a Senior Fellow at the Brookings Institution, Washington, D.C. From January 21, 1969 through September 19, 1969, he was Assistant to the defendant KISSINGER; and from August 1967 through January 1969 he was Deputy

Assistant Secretary of Defense for Policy Planning and Arms Control.

3. Plaintiff INA HALPERIN is a citizen of the United States and a resident of the State of Maryland. She resides with her husband, plaintiff MORTON HALPERIN.

4. Plaintiffs DAVID, MARK and GARY HALPERIN are minors and citizens of the United States, residing with their parents, plaintiffs MORTON and INA HALPERIN.

5. Defendant HENRY A. KISSINGER is Secretary of State and at the time this action was initiated was Assistant to the President of the United States for National Security Affairs, residing at 2527 Waterside Drive, NW, Washington, D.C. and working at the White House, 1600 Pennsylvania Avenue, Washington, D.C. He is sued in his individual and official capacities.

6. Defendant RICHARD M. NIXON is former President of the United States, presently residing at "Casa Pacifica", San Clemente, California. He is sued in his individual capacity.

7. Defendant JOHN N. MITCHELL is former Attorney General of the United States who at the time this action was initiated resided at 1030 Fifth Avenue, New York, New York. He is sued in his individual and former official capacities.

8. Defendant H. R. HALDEMAN is former Assistant to the President of the United States, residing at the time this action was initiated at 2402 R Street, NW, Washington, D.C. He is sued in his individual and former official capacities.

9. Defendant JOHN EHRLICHMAN is former Counsel to the President and former Assistant to the President of the United States for Domestic Affairs, residing at the time this action was initiated at 330 Chesapeake Drive, Great Falls, Virginia. He is sued in his individual and former official capacities.

10. Defendant ALEXANDER HAIG is Assistant to the President of the United States, formerly Deputy Assistant to the President of the United States for National Security

Affairs, and formerly Military Assistant to the defendant KISSINGER, residing at the time this action was initiated at Fort McNair, Washington, D.C. He is sued in his individual and official capacities.

11. WILLIAM C. SULLIVAN is former Director of the Office of National Narcotics Intelligence, Justice Department, and formerly assistant to the late Director of the Federal Bureau of Investigation, J. Edgar Hoover. At the time this action was initiated, he resided at 2810-64th Avenue, Cheverly, Maryland. He is sued in his individual and former official capacities.

12. Defendant ROBERT C. MARDIAN is a former Assistant Attorney General of the United States and a former official of the Committee to Re-elect the President, residing at 2323 North Central Avenue, Phoenix, Arizona. He is sued in his individual and former official capacities.

13. CLARENCE M. KELLEY is Director of the Federal Bureau of Investigation. He is sued in his official capacity as custodian of certain records hereinafter described.

14. Defendant JEB STUART MAGRUDER, is a former Special Assistant to the President and is currently serving a prison term in the Federal Penitentiary at Allenwood, Pennsylvania. He is sued in his individual and former official capacities.

15. Defendants JOHN DOE and RICHARD ROE are unknown agents of the Federal Bureau of Investigation. They are sued in their individual and official capacities.

16. Defendants JAMES POE and RICHARD DOE are unknown agents of the Executive Department or of other governmental agencies. They are sued in their individual and official capacities.

17. Defendant CHESAPEAKE AND POTOMAC TELEPHONE CO. is a District of Columbia corporation with its principal place of business at 725-13th Street, NW, Washington, D.C. It is a public utility providing telephone service for residents in the greater Washington area, including the plaintiffs.

FACTS

18. Upon information and belief, sometime in April, 1969, in Washington, D.C., defendants KISSINGER, NIXON, and HALDEMAN and the late J. Edgar Hoover, former Director of the Federal Bureau of Investigation, decided and agreed to conduct electronic surveillance of certain persons, including employees of the National Security Council, including plaintiff MORTON H. HALPERIN without securing any form of prior judicial approval. Defendant NIXON has subsequently stated that such decision and agreement were made, and subsequent actions taken, at his personal direction.

19. Thereafter, upon information and belief, defendant KISSINGER had a conversation with the late FBI Director J. Edgar Hoover in Washington, D.C., and at that time or subsequently directed and procured him to have FBI or other government agents install electronic surveillance devices on plaintiff MORTON HALPERIN's home telephone.

20. Upon information and belief, sometime in the month of May, 1969, in Washington, D.C., defendant MITCHELL, acting in concert with defendants HALDEMAN, EHRLICHMAN, NIXON, KISSINGER and HAIG, under color of his authority as Attorney General of the United States, and without application for or issuance of a judicial order or warrant, or other valid authoritization, directed and procured Mr. Hoover and other persons employed by the FBI or by other governmental agencies, to install an electronic, mechanical or other device at the private residence telephone of the plaintiffs at 8215 Stone Trail Drive, Bethesda, Maryland, for the purpose of intercepting the wire communications of plaintiff MORTON HALPERIN.

21. Upon information and belief, such a device was or devices are thereafter installed upon the home telephone of the plaintiffs by defendants JOHN DOE, RICHARD ROE, and other known and unknown agents of the Federal Bureau of Investigation and/or by JAMES POE, RICHARD DOE and other unknown agents of the Executive Department or other governmental agencies, acting at

the direction and procurement of defendants KISSINGER, NIXON, HAIG, MITCHELL, HALDEMAN and EHRLICHMAN.

22. Such a device was installed on the home telephone of plaintiffs on May 9, 1969, three days before any written authorization is claimed to have been secured from defendant MITCHELL or any authorized official of the Justice Department or other office of the Federal Government. Such installation, without any written authorization of the Attorney General was in violation of the governing rules and regulations of the Justice Department and the FBI.

23. Upon information and belief, defendant CHESAPEAKE AND POTOMAC TELEPHONE CO. assisted in the installation of such devices and participated in the interception of plaintiffs' telephone conversations.

24. Upon information and belief, the defendants named in paragraphs 21 and 23 above kept the said devices in place for a period of twenty-one months or more after its installation.

25. In September 1969, shortly after defendant KISSINGER accepted plaintiff MORTON H. HALPERIN's resignation from the National Security Council staff, defendant KISSINGER ordered that the Halperin tap continue at the same time that he consented to the termination of other taps instituted at his request.

26. During the course of this surveillance the defendants named above intercepted numerous conversations to which each of the plaintiffs were parties. Disclosure of such interceptions was procured by defendants NIXON, KISSINGER, HAIG, HALDEMAN and EHRLICHMAN by means of a request to the late J. Edgar Hoover and defendant SULLIVAN that summaries of these conversations be prepared and transmitted to them.

27. On a regular basis during the course of this illegal interception of plaintiffs' private telephone conversations, defendant SULLIVAN disclosed such conversations by preparing or causing to be prepared such summaries and transmitting them to the defendants NIXON, KIS-

SINGER, HAIG, HALDEMAN, and EHRLICHMAN for their examination and use.

28. On or about May 13, 1970, defendants NIXON and HALDEMAN met with the late FBI Director, J. Edgar Hoover, whereupon defendant NIXON specifically instructed Mr. Hoover to send all future summaries of plaintiffs' private telephone conversations to defendant HALDEMAN alone, which Mr. Hoover and his subordinates, including defendant SULLIVAN, thereafter did.

29. Sometime in the month of July, 1971, in San Clemente, California, defendant NIXON, in the presence of defendant EHRLICHMAN, personally instructed defendant MARDIAN physically to remove from the Federal Bureau of Investigation all documents, tapes, summaries, and other records pertaining to the defendants' electronic surveillance of the plaintiffs and certain other persons, and to deliver such records to the White House.

30. Following his meeting with defendant NIXON as set forth in the preceding paragraph, defendant MARDIAN, with the assistance of defendant SULLIVAN, physically removed from the Federal Bureau of Investigation all records pertaining to the defendants' electronic surveillance of the plaintiffs and certain other persons and delivered such records to the Oval Office of the White House for the purpose of their fraudulent concealment, following which, at the direction of defendant NIXON, the records were secreted in a safe in the White House office of defendant EHRLICHMAN, where they remained fraudulently concealed from July 1971 until May 1973.

31. On information and belief, the purpose of the concealment of the surveillance records by defendants MARDIAN, EHRLICHMAN and SULLIVAN, acting on personal instructions of defendant NIXON, as alleged in the preceding paragraphs, was to prevent appropriate discovery by the defense in *United States* v. *Ellsberg and Russo*, No. 9373 (WMB) - CD (C.D. Cal.) of the interception of conversations of the defendant in that case, Daniel Ellsberg, and his consultant, plaintiff MORTON H. HALPERIN, on the Halperins' home telephone.

31a. Defendant NIXON, acting direclty and through his agents, made continuing efforts from July 1971 to May 1973 to prevent disclosure of the existence of and records pertaining to the wiretap on plaintiffs' home telephone by deceiving attorneys in the Department of Justice and the Acting Director of the Federal Bureau of Investigation, and procuring false testimony from them denying the existence of the wiretaps in response to judicial and congressional inquiries.

32. The existence of an electronic surveillance device on a telephone at their residence first became known to the plaintiffs on May 10, 1973, when the trial judge in *United States* v. *Ellsberg and Russo, supra*, ordered the release of a memorandum filed with the court on May 9, 1973, by William D. Ruckelshaus, Acting Director of the Federal Bureau of Investigation. The memorandum stated in pertinent part:

> A preliminary report which I received last night indicates that an F.B.I. employee recalls that in late 1969 and early 1970 Mr. Ellsberg had been overheard talking from an electronic surveillance of Dr. Morton Halperin's residence. It is this employee's recollection that the surveillance was of Dr. Halperin, and that Mr. Ellsberg was then a guest of Dr. Halperin.
>
> I have no information concerning the substance of the conversation, nor has the investigation to date been able to find any record of such a conversation. The investigation, of course, is not complete, and further facts bearing upon the wiretaps may be uncovered.

33. Subsequently, acting F.B.I. Director Ruckelshaus recovered the missing surveillance records from a safe in the White House office of defendant EHRLICHMAN and returned them to the Federal Bureau of Investigation.

34. On July 24, 1974, defendant NIXON, in a letter to the Chairman of the Senate Foreign Relations Committee, described his role in the wiretapping of plaintiffs as follows:

> Where supporting evidence was available I personally directed the surveillance, including wiretapping, of certain specific individuals. I am familiar with the

testimony of Secretary Kissinger before your Committee to the effect that he performed the function, at my request, of furnishing information about individuals within investigative categories that I established so that an appropriate and effective investigation could be conducted in each case. This testimony is entirely correct, and I wish to affirm categorically that Secretary Kissinger and others involved in various aspects of the investigation were operating under my specific authority and were carrying out my express orders.

35. From May 1969 until September 19, 1969, while plaintiff MORTON HALPERIN was serving as Assistant to defendant KISSINGER, he and plaintiff INA HALPERIN frequently communicated their political and other views privately and frankly in telephone conversations with their close friends. On information and belief these conversations were recorded and summarized in regular reports to the defendants KISSINGER, NIXON, HAIG, HALDEMAN and EHRLICHMAN, based on the continuous electronic surveillance of plaintiffs' telephone during the period in question.

36. On information and belief, the defendants' illegal interception, disclosure and use of conversations on the private telephone in plaintiffs' residence continued for a period of twenty-one months or more, after plaintiff MORTON HALPERIN had left the staff of the National Security Council. During this period plaintiff MORTON HALPERIN, no longer a government employee, frequently communicated by telephone with many persons, including high elected officials, who expressed their views of current government policies. Plaintiff MORTON HALPERIN also wrote many articles for newspapers and journals in this period and communicated by telephone with many individuals in the course of preparing these articles. All these communications were privately expressed but, on information and belief, were intercepted under the direction of defendant SULLIVAN, and disclosed and used in regular reports to the defendants KISSINGER, NIXON, HAIG, HALDEMAN and EHRLICHMAN.

37. On one specific occasion plaintiff MORTON HALPERIN was in telephone contact with Leslie Gelb who was working on an article with former Secretary of Defense Clark Clifford relating to American policy in Vietnam. Plaintiff MORTON HALPERIN discussed with Mr. Gelb on his telephone an outline of points Clifford might make in such an article, and steps Clifford might take to insure a broad audience for his views. Upon learning of the interception of this conversation, defendant SULLIVAN transmitted information about the conversation to defendants KISSINGER, MITCHELL and NIXON, through J. Edgar Hoover. This information was subsequently received by defendants EHRLICHMAN and HALDEMAN who transmitted it to defendant MAGRUDER, who in turn transmitted it to Alexander Butterfield, then a deputy assistant to the President, early in January, 1970. HALDEMAN instructed defendant MAGRUDER, then a special assistant to the President, to work on planning answers to the criticisms of the Administration's Vietnam policy which the intercepted conversations revealed would be made in the Clifford article. In various communications in January, 1970, defendants MAGRUDER, HALDEMAN and EHRLICHMAN suggested various ways in which to answer the article once it appeared and to attempt to discredit its author. The activities described in this paragraph were in no way related to the defense of national security. They constituted illegal political intelligence gathering designed to counter constitutionally protected political criticism of administration policies.

38. On information and belief, the defendants' electronic surveillance of the plaintiff MORTON HALPERIN and his family was initiated, continued and concealed, by the defendants KISSINGER, NIXON, HAIG, EHRLICHMAN, HALDEMAN and MITCHELL in bad faith for the purpose and effect of monitoring the political ideas and associations of plaintiff MORTON HALPERIN during the period in question.

39. At no time did the plaintiffs, citizens of the United States, have any involvement with a foreign power, its agents or agencies.

40. After the fact of the wiretaps on plaintiff MORTON HALPERIN's home telephone was made a matter of public record, FBI agents questioned defendant HAIG concerning the basis of the wiretaps and the reasons, justifications and value of the taps. Defendant HAIG told said FBI agents that plaintiff MORTON HALPERIN was relieved of his responsibilities in the National Security Council as a result of his overheard telephone conversations. These statements were made by defendant HAIG in bad faith and for the purpose of injuring plaintiff MORTON HALPERIN and were false and were known to defendant HAIG to be false when he made them.

CLAIMS

41. The defendants' procurement of interception, disclosure and use, and their interception, disclosure and use of plaintiffs' telephone conversations during the period in question were unreasonable and illegal, and were not made in good faith reliance on any judicial, legislative or other valid authorization; and their disclosure and use of such communications were made with knowledge that the communications had been obtained by electronic surveillance of plaintiffs' telephone.

42. Defendants' procurement and interception, disclosure and use, and their interception, disclosure and use of the plaintiffs wire communications through electronic surveillance for a period of 8 to 25 months or more, was in violation of Title 18, United States Code, Sections 2511 and 2520.

43. Defendants' procurement of interception, disclosure and use, and their interception, disclosure and use of plaintiffs' telephone communications during the period in question, deprived plaintiffs of their rights of free speech and association under the First Amendment, and their right to privacy and security against unreasonable

searches and seizures guaranteed by the First, Fourth and Ninth Amendments.

WHEREFORE, plaintiffs pray that:

1. Each plaintiff have judgment against each defendant (except defendant KELLEY) in the sum of:

(a) $100.00 per day of procurement of interception, disclosure and use, and interception, disclosure and use, or $1,000.00, whichever is higher, as liquidated damages pursuant to Title 18, United States Code, § 2520.

(b) Such punitive damages as the court deems just under the circumstances.

2. Plaintiffs individually have judgment against each defendant (except defendant KELLEY) in a sum deemed just by the court for violation of their rights under the First, Fourth and Ninth Amendments.

3. Plaintiffs jointly have judgment against the defendants jointly for reasonable attorneys' fees and other costs reasonably incurred in connection with this action, pursuant to Title 18, United States Code, § 2520(c).

4. This court enjoin the defendants from any further procurement of interception, use and disclosure and any further interception, use and disclosure of plaintiffs' wire communications.

5. That defendant KELLEY be ordered to hand up to plaintiffs all records and logs relating to the electronic surveillance of plaintiffs.

6. This court declare the action of defendants as herein described in violation of Title 18, United States Code § 2511 and § 2520 and of the First, Fourth and Ninth Amendments to the Constitution.

7. This court require the FBI to correct the false statement contained in the interview report with defendant HAIG by noting that said statements were inconsistent with other documentation in its files relating to the wiretaps in question.

8. This court grant such other and further relief as to it may seem just and proper.

Respectfully submitted,

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SEPTEMBER 30, 1974

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

ANSWER TO SECOND AMENDED COMPLAINT BY DEFENDANTS KISSINGER, HAIG, SULLIVAN AND KELLEY

Come now defendants Kissinger, Haig, Sullivan and Kelley, hereafter the Federal defendants, by their undersigned attorneys, and in answer to the Second Amended Complaint filed herein, say:

FIRST DEFENSE

The national security electronic surveillance of the telephone installation of the plaintiffs, located at 8215 Stone Trail Drive, Bethesda, Maryland, referred to in the Second Amended Complaint, was authorized by the President of the United States, acting through the Attorney General, in the exercise of his authority relating to the Nation's foreign affairs, and was conducted for foreign policy purposes and was deemed necessary to protect national security information against foreign intelligence activities and as such was lawful and not violative of any provision of the Constitution of the United States or the provision of any Federal statute.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

At all times material herein, all activities of the aforesaid Federal defendants in the premises were performed in furtherance of their official duties, were within the scope of their authority, and were not in excess of their statutory authority. The aforesaid Federal defendants are, therefore, absolutely immune from civil liability therefore under the doctrine of official immunity.

FOURTH DEFENSE

The doctrine of soverign immunity bars any suit against the United States where the United States has not consented to be sued. This suit is barred by the doctrine of sovereign immunity since it is in law and fact a suit against the United States to which the United States has not consented.

FIFTH DEFENSE

At all times material herein, all activities of the aforesaid Federal defendants in the premises were performed in furtherance of their official duties, were undertaken in good faith and in the reasonable belief that such activities were necessary, lawful and within the scope of their authority. The aforesaid Federal defendants are, therefore, not liable to the plaintiffs in damages for such activity.

SIXTH DEFENSE

The Second Amended Complaint fails to state a claim upon which relief can be granted.

SEVENTH DEFENSE

The claim of the plaintiffs is barred by the Statute of Limitations.

EIGHTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Second Amended Complaint, the Federal defendants aver:

1. The Federal defendants admit that the action purports to be as alleged in the first two sentences of paragraph 1 of the Second Amended Complaint, but deny that they have taken any action in violation of the plaintiffs' constitutional or statutory rights. The Federal defendants deny the allegations contained in the third sentence of paragraph 1 of the Second Amended Complaint.

2-4. The Federal defendants admit, on information and belief, the allegations contained in paragraph 2-4 of the Second Amended Complaint.

5. Federal defendant Kissinger admits, and on information and belief the remaining Federal defendants admit the allegations contained in paragraph 5 of the Second Amended Complaint and that the plaintiffs purport to sue defendant Kissinger individually and in his official capacity. Defendant Kissinger denies that any action has been taken by him against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further denies that the plaintiffs are entitled to judicial relief against him in any form or manner.

6-9. The Federal defendants admit, on information and belief, the allegations contained in paragraphs 6-9 of the Second Amended Complaint, and that the plaintiffs purport to sue each of those named defendants in his individual and former official capacities.

10. Federal defendant Haig denies, and on information and belief, the remaining Federal defendants deny, that defendant Haig is an Assistant to the President, but Federal defendant Haig admits, and on information and belief, the remaining Federal defendants admit, that defendant Haig was formerly Deputy Assistant to the President of the United States for National Security Affairs, and formerly Military Assistant to the defendant Kissinger, and was residing at the time this action was initiated at Fort

McNair, Washington, D.C., and that plaintiffs purport to sue defendant Haig in his individual and official capacities. Defendant Haig denies that any action has been taken by him against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further denies that the plaintiffs are entitled to judicial relief against him in any form or manner.

11. Federal defendant Sullivan admits, and on information and belief, the remaining Federal defendants admit that until his retirement on June 30, 1973, defendant Sullivan was the Director of the Office of National Narcotics Intelligence of the United States Department of Justice and that he formerly served as Assistant to the Director of the Federal Bureau of Investigation, and that the plaintiffs purport to sue him in his individual and former official capacities, but deny the remaining allegations contained in paragraph 11 of the Second Amended Complaint. Federal defendant Sullivan denies that any action has been taken by him against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further denies that the plaintiffs are entitled to judicial relief against him in any form or manner.

12. The Federal defendants admit, on information and belief, the allegations contained in paragraph 12 of the Second Amended Complaint, and that the plaintiffs purport to sue defendant Mardian in his individual and former official capacity.

13. Federal defendant Kelley admits, and on information and belief the remaining Federal defendants admit the allegations contained in paragraph 13 of the Second Amended Complaint, but Federal defendant Kelley denies that any action has been taken by him against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further denies that the plaintiffs are entitled to judicial relief against him in any form or manner.

14. The Federal defendants admit, upon information and belief, that defendant Magruder is a former Special Assistant to the President, but deny, on information and be-

lief, that he is presently serving a prison term. The Federal defendants admit that plaintiffs purport to sue the defendant in his individual and former official capacities.

15. The plaintiffs may not properly sue "John Doe" and "Richard Roe" defendants. Accordingly, the Federal defendants are not required to respond to the allegations contained in paragraph 15 of the Second Amended Complaint. If an action may properly be brought against such unnamed persons, the Federal defendants admit that Special Agents of the Federal Bureau of Investigation acted in the premises at the behest of certain of the Federal defendants, as stated hereafter, but deny that any special Agent so acting has taken any action against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further deny that plaintiffs are entitled to judicial relief against such unnamed persons in any form or manner.

16. The plaintiffs may not properly sue "James Poe" and "Richard Doe" defendants. Accordingly, the Federal defendants are not required to respond to the allegations contained in paragraph 16 of the Second Amended Complaint. If an action may properly be brought against such unnamed persons, the Federal defendants deny, on information and belief, that any agents of the Executive Department or other governmental agencies have taken any action against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further deny that plaintiffs are entitled to judicial relief against such unnamed persons in any form or manner.

17. The Federal defendants admit the allegations contained in paragraph 17 of the Second Amended Complaint but, on information and belief, deny that any action has been taken by defendant Chesapeake and Potomac Telephone Company against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further deny that plaintiffs are entitled to judicial relief against such defendants in any form or manner.

18. Federal defendant Kissinger admits that in late April, 1969, in Washington, D.C., he attended a meeting

with then President Nixon and others, during which a decision was made to conduct electronic surveillance of certain persons including employees of the National Security Council, and including plaintiff Morton H. Halperin, in an effort to discover the source of sources of leaks of highly classified information; such investigative program was instituted by the President, and, on information and belief, each electronic surveillance conducted thereunder was authorized by the Attorney General. Federal defendant Kissinger denies all allegations contained in paragraph 18 of the Second Amended Complaint inconsistent herewith. Federal defendants Haig, Sullivan and Kelley lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Second Amended Complaint.

19. The Federal defendants admit, on information and belief, that in May, 1969, the Director of the Federal Bureau of Investigation was advised that on a number of occasions in the preceding weeks, information relating to foreign policy initiatives and to the national defense had appeared in the news media; that the disclosure of such information could cause damage to the national defense; that the disclosure of such information had not been authorized by officials of the United States who had the authority to do so; that the authorized access to such information was limited to a few officials and employees of the United States; that continued disclosures of such information could severely impair the ability of the President to conduct foreign policy and could damage the national security of the United States; that it was the direction of the President of the United States that the Director of the Federal Bureau of Investigation cause to be made an investigation, using every lawful means, to determine the source or sources of the unauthorized disclosures of such information; that defendant Kissinger would provide the Director of the Federal Bureau of Investigation with the names of certain officials and employees of the United States who had access to such information. Federal defendants Kissinger, Haig, Sullivan and Kelley further admit that one of the names provided to the Director of

the Federal Bureau of Investigation by defendant Haig at the direction of defendant Kissinger was that of plaintiff Morton H. Halperin. Federal defendants Kelley and Sullivan admit that thereafter, based upon this and other information in the possession of certain of the defendants and the Federal Bureau of Investigation, agents of the Federal Bureau of Investigation installed an electronic surveillance device upon the telephone of plaintiff Halperin located at his residence at 8215 Stone Trail Drive, Bethesda, Maryland. The Federal defendants deny all allegations contained in paragraph 19 of the Second Amended Complaint inconsistent herewith.

20. Federal defendants Kelley and Sullivan admit, and on information and belief defendants Kissinger and Haig admit that pursuant to the investigative program instituted by then President Nixon as aforesaid, a memorandum was transmitted from the Director of the Federal Bureau of Investigation to defendant Mitchell, then Attorney General of the United States, on May 12, 1969, requesting written authorization for the installation of a telephone surveillance upon the telephone located at the residence of plaintiff Morton H. Halperin at 8215 Stone Trail Drive, Bethesda, Maryland, for the purpose of monitoring the wire communications of the plaintiff, and that on May 12, 1969 written approval for such surveillance was granted by defendant Mitchell. The above Federal defendant further admit that no application for a judicial order or warrant for such surveillance was either sought or procured by any of the Federal defendants. The above Federal defendants deny all allegations contained in paragraph 20 of the Second Amended Complaint inconsistent herewith.

21. Federal defendants Kelley and Sullivan admit, and on information and belief defendants Kissinger and Haig admit that pursuant to the direction of the President of the United States, a telephone surveillance was installed on the telephone at the residence of plaintiff Morton H. Halperin on May 9, 1969, and that such surveillance was conducted by agents of the Federal Bureau of Investigation. The above Federal defendants deny all allegations

contained in paragraph 21 of the Second Amended Complaint inconsistent herewith.

22. Federal defendants Kelley and Sullivan admit that following the authorization of such a surveillance by the President of the United States, the telephone surveillance of the plaintiffs was instituted on May 9, 1969, three days prior to the signing of the written authorization for such surveillance by defendant Mitchell. Federal defendants Kelley and Sullivan deny all allegations contained in the first sentence of paragraph 22 of the Second Amended Complaint inconsistent herewith. Federal defendants Kelley and Sullivan deny the allegations contained in the second sentence of paragraph 22 of the Second Amended Complaint. Federal defendants Kissinger and Haig lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Second Amended Complaint.

23. Federal defendants Kelley and Sullivan admit the allegations contained in paragraph 23 of the Second Amended Complaint. Federal defendants Kissinger and Haig lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Second Amended Complaint.

24. Federal defendants Kelley and Sullivan admit that agents of the Federal Bureau of Investigation, with the assistance of defendant Chesapeake and Potomac Telephone Company, continued the telephone surveillance of the plaintiffs' residence from May 9, 1969 until February 10, 1971. The above Federal defendants deny all allegations contained in paragraph 24 of the Second Amended Complaint inconsistent herewith. Federal defendants Kissinger and Haig lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Second Amended Complaint.

25. Federal defendant Kissinger denies that in September, 1969, he ordered the continuation of the telephone surveillance of the plaintiffs, authorized by the President of the United States. Federal defendant Kissinger further

denies that he was ever called upon to consent or not to consent to the termination of other national security surveillance. Federal defendant Kissinger denies all allegations contained in paragraph 25 of the Second Amended Complaint inconsistent herewith. Federal defendants Kelley, Sullivan, and Haig lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 of the Second Amended Complaint.

26. Federal defendants Kelley and Sullivan admit the allegations contained in the first sentence of paragraph 26 of the Second Amended Complaint. Federal defendants Kissinger and Haig lack knowledge sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 26 of the Second Amended Complaint. Federal defendants Kelley, Sullivan, Kissinger, and Haig further admit that during the course of the telephone surveillance of the plaintiffs' residence, summaries of the overhears of certain of their conversations were made available to defendants Nixon, Kissinger, Haldeman, Haig, and others by the Federal Bureau of Investigation through the assistance of the then Director J. Edgar Hoover, but deny all allegations contained in the second sentence of paragraph 26 of the Second Amended Complaint inconsistent herewith. Federal defendant Sullivan further denies that he was requested to, or that he transmitted such summaries to defendants Nixon, Kissinger, Haldeman, Haig, and others.

27. Federal defendants Kelley, Sullivan, Kissinger, and Haig admit that during the lawful telephone surveillance of the plaintiffs' residence, summaries of certain of the overhears of the conversations of the plaintiffs were periodically made available to defendants Nixon, Kissinger, Haldeman, Haig, and others for their examination and use, and that such summaries were prepared or caused to be prepared by defendant Sullivan and others who transmitted them to the then Director of the Federal Bureau of Investigation who thereafter transmitted them to defendants Nixon, Haldeman, Kissinger, and others. The above Federal defendants deny all allegations con-

tained in paragraph 27 of the Second Amended Complaint inconsistent herewith.

28. The Federal defendants do not have personal knowledge of the meeting alleged in paragraph 28 of the Second Amended Complaint, and therefore lack knowledge or information sufficient to form a belief as to this allegation; but the Federal defendants admit that after May 13, 1970, all summaries of plaintiffs' telephone conversations were transmitted from former Director Hoover to defendant Haldeman. The Federal defendants deny all allegations contained in paragraph 28 of the Second Amended Complaint inconsistent herewith.

29. The Federal defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29 of the Second Amended Complaint.

30. Federal defendants Kissinger and Haig lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the Second Amended Complaint. Federal defendant Kelley admits that the files of the Federal Bureau of Investigation reflect that the records relating to the electronic surveillance of the plaintiffs and others were removed from Federal Bureau of Investigation Headquarters at the direction of defendant Sullivan, and were provided to defendant Mardian, then Assistant Attorney General in charge of the Internal Security Division, in the Department of Justice; and that such records were subsequently located in a safe-room in the Old Executive Office Building, but other than aforesaid, Federal defendant Kelley lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the Second Amended Complaint. Federal defendant Sullivan admits that he caused to have removed from the Headquarters of the Federal Bureau of Investigation, and delivered to defendant Mardian in the Department of Justice, all records relating to the electronic surveillance of the plaintiffs and others; and that following his retirement from the Federal Bureau of Investigation on October 21,

1971, he learned in May 1973, that such documents were then stored in the Old Executive Office Building, but he denies that such removal by him of the above records was for the purpose of fraudulent concealment, and denies all allegations contained in paragraph 30 of the Second Amended Complaint inconsistent herewith. Federal defendant Sullivan lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the above paragraph.

31. Federal defendant Sullivan denies as to himself, all allegations contained in paragraph 31 of the Second Amended Complaint. Federal defendants Kissinger, Haig and Kelley lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the Second Amended Complaint.

31a. Federal defendants Kelley, Sullivan, Kissinger, and Haig lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31a of the Second Amended Complaint.

32. Federal defendants Kelley, Sullivan, Kissinger, and Haig lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 32 of the Second Amended Complaint.

33. Federal defendants Kelley and Haig admit that William Ruckelshaus recovered the records of the telephone surveillance of the plaintiffs' residence from a safe-room in the Old Executive Building, and that the original copies of such documents are now in the possession of the Clerk of the United States District Court for the District of Columbia, but deny all allegations contained in paragraph 33 of the Second Amended Complaint inconsistent herewith. Federal defendants Sullivan and Kissinger lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the Second Amended Complaint.

34. The Federal defendants deny that the information set forth in paragraph 34 of the Second Amended Complaint accurately quotes the language contained in portions of the July 12, 1974 letter from defendant Nixon to Sena-

tor J. William Fulbright, or that the quoted language reflects what it purports to represent.

35. Federal defendants Kelley, Sullivan, Kissinger and Haig admit that from May 1969 until September 19, 1969, plaintiffs communicated their views in telephone conversations with associates and others, but other than aforesaid, lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the first sentence of paragraph 35 of the Second Amended Complaint. Federal defendants Kelley, Sullivan, Kissinger, and Haig admit that from May 1969, until September 19, 1969, overhears of plaintiffs' telephone conversations were periodically summarized and that such summaries were made available to defendants Nixon, Kissinger, Haldeman, Haig, and others based upon the continuing telephone surveillance of the plaintiffs' residence during the period in question, but deny all allegations contained in the second sentence of paragraph 35 of the Second Amended Complaint inconsistent herewith.

36. Federal defendants Kelley and Sullivan admit, and on information and belief Federal defendants Kissinger and Haig admit that the lawful interception, disclosure and use of conversations overheard on the telephone located at the plaintiffs' residence continued from May 9, 1969, until February 10, 1971, but deny all allegations contained in the first sentence of paragraph 36 of the Second Amended Complaint inconsistent herewith. Federal defendants Kelley and Sullivan admit, and on information and belief Federal defendants Kissinger and Haig admit the allegations contained in the second and third sentences of paragraph 36 of the Second Amended Complaint. Federal defendants Kissinger, Haig, Kelley and Sullivan admit that the telephone surveillance of the plaintiffs' residence was instituted pursuant to the authority of the President of the United States and the authorization of the Attorney General, and was conducted under the supervision of defendant Sullivan and others, and that summaries of the overhears of such surveillance were, during the course of such surveillance, periodically made available to

defendants Nixon, Kissinger, Haldeman, Haig, and others, but deny all allegations contained in the fourth sentence of paragraph 36 of the Second Amended Complaint inconsistent herewith.

37. Federal defendants Kelley, Sullivan, Kissinger and Haig admit that a December 29, 1969 letter from J. Edgar Hoover, then Director of the Federal Bureau of Investigation to then President Richard M. Nixon stated *inter alia* that "Halperin was recently in contact with an unidentified individual who told Halperin that he had received a call from Clark Clifford. Clifford is probably identical with the former Secretary of Defense. According to this individual he and Clifford discussed an article which Clifford may be preparing. *** This individual then discussed the fact that he had to submit an outline of the article and an introduction of it to Clifford." Federal defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first two sentences of paragraph 37 of the Second Amended Complaint, other than as set forth above. Federal defendants Kelley and Sullivan admit that the same information contained in the December 29, 1969 letter from Mr. Hoover to then President Nixon was transmitted the same date to defendants Mitchell and Kissinger by correspondence from Mr. Hoover, but deny all allegations contained in the third sentence of paragraph 37 of the Second Amended Complaint inconsistent herewith. Other than as it relates to themselves, Federal defendants Kissinger and Haig lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third sentence of paragraph 37 of the Second Amended Complaint. Federal defendants Kelley, Sullivan, Kissinger and Haig lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fourth, fifth and sixth sentences of paragraph 37 of the Second Amended Complaint. Federal defendants Kelley, Sullivan, Kissinger and Haig deny the allegations contained in the seventh and eighth sentences of paragraph 37 of the Second Amended Complaint to the extent that they relate to the Federal defendants reply to the first three sentences

of the above paragraph, but lack knowledge or information sufficient to form a belief as to the truth of such allegations to the extent they relate to the remaining sentences contained in the above paragraph.

38. Federal defendants Kelley, Sullivan, Kissinger and Haig deny as to themselves, the allegations contained in paragraph 38 of the Second Amended Complaint.

39. The Federal defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 39 of the Second Amended Complaint.

40. Federal defendants Kelley and Haig admit the allegations contained in the first sentence of paragraph 40 of the Second Amended Complaint. Federal defendants Sullivan and Kissinger lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 40 of the Second Amended Complaint. Federal defendant Haig alleges that during his interview with Special Agents of the Federal Bureau of Investigation, he stated that during the course of the surveillance of plaintiff Morton Halperin his access to certain classified information was restricted, and thereafter he resigned from the National Security Council staff, but denies all allegations contained in the second sentence of paragraph 40 of the Second Amended Complaint inconsistent herewith. Federal defendant Haig denies the allegations contained in the third sentence of paragraph 40 of the Second Amended Complaint. Federal defendants Kelley, Sullivan and Kissinger lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second and third sentences of paragraph 40 of the Second Amended Complaint.

41. Federal defendants Kelley, Sullivan, Kissinger, and Haig admit, as to themselves, that any disclosure or use by them of the telephone conversations of the plaintiffs was made with the knowledge that such communications had been obtained by electronic surveillance of the plaintiffs' telephone, but deny all other allegations contained in paragraph 41 of the Second Amended Complaint.

42. The Federal defendants deny, as to themselves, the allegations contained in paragraph 42 of the Second Amended Complaint.

43. The Federal defendants deny, as to themselves, the allegations contained in paragraph 43 of the Second Amended Complaint.

WHEREFORE, the Federal defendants, having fully answered the allegations contained in the numbered paragraphs of the Second Amended Complaint, hereby pray that the Second Amended Complaint herein be dismissed.

Respectfully submitted,

JOHN C. KENNEY
Acting Assistant Attorney General

ROBERT L. KEUCH
Attorney, Department of Justice

/s/ _____
EDWARD S. CHRISTENBURY
Attorney, Department of Justice

/s/ _____
ELIZABETH G. WHITAKER
Attorney, Department of Justice
Washington, D.C. 20530
Phone: 202/739-2361

Attorneys for the defendants Kissinger, Haig, Sullivan and Kelley.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS

ANSWER TO SECOND AMENDED COMPLAINT BY DEFENDANT RICHARD M. NIXON

Defendant Richard M. Nixon, by counsel, and in answer to the Second Amended Complaint filed herein, says:

FIRST DEFENSE

The national security electronic surveillance of the telephone installation of the plaintiffs, located at 8215 Stone Trail Drive, Bethesda, Maryland, referred to in the Second Amended Complaint, was authorized by the defendant Nixon, then President of the United States, acting through the Attorney General, in the exercise of his authority relating to the Nation's foreign affairs, and was conducted for foreign policy purposes and was deemed necessary to protect national security information against foreign intelligence activities and as such was lawful and not violative of any provision of the Constitution of the United States or the provision of any Federal statute.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

The Court lacks jurisdiction over the person of defendant Richard M. Nixon.

FOURTH DEFENSE

At all times material herein, all activities of the Defendant Nixon in the premises were performed in furtherance of his official duties as President of the United States, were not in excess of his Constitutional and statutory authority, and were within the scope of the broad discretion conferred upon the Office of the President of the United States by Article II of the Constitution. Pursuant to the doctrines of Presidential privilege and immunity, the Defendant Nixon is, therefore, absolutely immune from civil liability therefor and the Courts are without power to review discretionary actions taken within the scope of his authority as President of the United States.

FIFTH DEFENSE

At all times material herein, all activities of the Defendant Nixon in the premises were performed in furtherance of his official duties, were within the scope of his authority, and were not in excess of his statutory authority. The aforesaid Defendant Nixon is, therefore, absolutely immune from civil liability therefor under the doctrine of official immunity.

SIXTH DEFENSE

The doctrine of sovereign immunity bars any suit against the United States where the United States has not consented to be sued. This suit is barred by the doctrine of sovereign immunity since it is in law and fact a suit against the United States to which the United States has not consented.

SEVENTH DEFENSE

At all times material herein, all activities of the Defendant Nixon in the premises were performed in furtherance of his official duties, were undertaken in good faith and in the reasonable belief that such activities were necessary,

lawful and within the scope of his authority. The Defendant Nixon is, therefore, not liable to the plaintiffs in damages for such activity.

EIGHTH DEFENSE

The Second Amended Complaint fails to state a claim upon which relief can be granted.

NINTH DEFENSE

The claim of the plaintiffs is barred by the Statute of Limitations.

TENTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Second Amended Complaint, the Defendant Nixon avers:

1. The Defendant Nixon admits that the action purports to be an alleged in the first two sentences of paragraph 1 of the Second Amended Complaint, but denies that he has taken any action in violation of the plaintiffs' constitutional or statutory rights. The Defendant Nixon denies the allegations contained in the third sentence of paragraph 1 of the Second Amended Complaint.

2-4. The Defendant Nixon admits, on information and belief, the allegations contained in paragraphs 2-4 of the Second Amended Complaint.

5. The Defendant Nixon admits, on information and belief, the allegations contained in paragraph 5 of the Second Amended Complaint and that the plaintiffs purport to sue Defendant Kissinger individually and in his official capacity.

6. The Defendant Nixon admits the allegations contained in paragraph 6 of the Second Amended Complaint and that the plaintiffs purport to sue him in his individual capacity. Defendant Nixon denies that any action has been taken by him against plaintiffs which is actionable in a suit

for violation of their constitutional or other legal rights and further denies that the plaintiffs are entitled to judicial relief against him in any form or manner.

7-9. The Defendant Nixon admits, on information and belief, the allegations contained in paragraphs 7-9 of the Second Amended Complaint, and that the plaintiffs purport to sue each of those named defendants in their individual and former official capacities.

10. The Defendant Nixon, on information and belief, denies that defendant Haig is an Assistant to the President, but Defendant Nixon admits, on information and belief, that Defendant Haig was formerly Deputy Assistant to the President of the United States for National Security Affairs, and formerly Military Assistant to Defendant Kissinger, and was residing at the time this action was initiated at Fort McNair, Washington, D.C., and that plaintiffs purport to sue defendant Haig in his individual and official capacities.

11. The Defendant Nixon admits, on information and belief, that until Defendant Sullivan's retirement on June 30, 1973, Defendant Sullivan was the Director of the Office of National Narcotics Intelligence of the United States Department of Justice and that he formerly served as Assistant to the Director of the Federal Bureau of Investigation, and that the plaintiffs purport to sue him in his individual and former official capacities, but denies the remaining allegations contained in paragraph 11 of the Second Amended Complaint.

12. The Defendant Nixon admits, on information and belief, the allegations contained in paragraph 12 of the Second Amended Complaint, and that the plaintiffs purport to sue Defendant Mardian in his individual and former official capacity.

13. The Defendant Nixon admits, on information and belief, the allegations contained in paragraph 13 of the Second Amended Complaint.

14. The Defendant Nixon admits, on information and belief, that Defendant Magruder is a former Special Assistant to the President, but denies, on information and

belief, that he is presently serving a prison term. The Defendant Nixon admits that plaintiffs purport to sue the defendant in his individual and former official capacities.

15. The plaintiffs may not properly sue "John Doe" and "Richard Roe" defendants. Accordingly, the Defendant Nixon is not required to respond to the allegations contained in paragraph 15 of the Second Amended Complaint. If an action may properly be brought against such unnamed persons, the Defendant Nixon admits, on information and belief, that Special Agents of the Federal Bureau of Investigation acted in the premises at the behest of certain of the Federal defendants, as stated hereafter, but denies that any special Agent so acting has taken any action against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further denies that plaintiffs are entitled to judicial relief against such unnamed persons in any form or manner.

16. The plaintiffs may not properly sue "James Poe" or "Richard Doe" defendants. Accordingly, the Defendant Nixon is not required to respond to the allegations contained in paragraph 16 of the Second Amended Complaint. If an action may properly be brought against such unnamed persons, the Defendant Nixon denies, on information and belief, that any agents of the Executive Department of other governmental agencies have taken any action against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further denies that plaintiffs are entitled to judicial relief against such unnamed persons in any form and manner.

17. The Defendant Nixon admits the allegations contained in paragraph 17 of the Second Amended Complaint but, on information and belief, denies that any action has been taken by Defendant Chesapeake and Potomac Telephone Company against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further denies that plaintiffs are entitled to judicial relief against the defendants in any form or manner.

18. Defendant Nixon admits that in late April, 1969, in Washington, D.C., he attended a meeting with others, during which a decision was made to conduct electronic surveillance of certain persons including employees of the National Security Council, and including plaintiff Morton H. Halperin, in an effort to discover the source or sources of leaks of highly classified information; Defendant Nixon denies all allegations in paragraph 18 of the Second Amended Complaint inconsistent herewith except that he admits writing the letter to the Chairman of the Senate Foreign Relations Committee referred to in paragraph 34 of the Second Amended Complaint and he stands on the contents of that letter.

19–25. The Defendant Nixon admits the contents of his letter of July 12, 1974, to the Chairman of the Senate Foreign Relations Committee referred to in paragraph 34 of the Second Amended Complaint, but beyond that, lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 19–25 of the Second Amended Complaint.

26–28. The Defendant Nixon presently lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 26–28 of the Second Amended Complaint.

29. The Defendant Nixon denies, as to himself, the allegations contained in paragraph 29 of the Second Amended Complaint.

30. The Defendant Nixon lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the Second Amended Complaint.

31. The Defendant Nixon denies, as to himself, the allegations contained in paragraph 31 of the Second Amended Complaint.

31a. The Defendant Nixon denies, as to himself, the allegations contained in paragraph 31a of the Second Amended Complaint.

32–33. The Defendant Nixon lacks knowledge or information sufficient to form a belief as to the truth of the

allegations contained in paragraphs 32–33 of the Second Amended Complaint.

34. The Defendant Nixon denies that the information set forth in paragraph 34 of the Second Amended Complaint accurately quotes the language contained in portions of his July 12, 1974, letter to Senator J. William Fulbright, or that the quoted information represents the full text of such letter, but that for the purposes of this action admits that the quoted language reflects what it purports to represent.

35–37. The Defendant Nixon lacks knowledge of information sufficient to form a belief as to the truth of the allegations contained in paragraphs 35–37 of the Second Amended Complaint.

38. The Defendant Nixon denies, as to himself, the allegations contained in paragraph 38 of the Second Amended Complaint.

39–40. The Defendant Nixon lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 39–40 of the Second Amended Complaint.

41–43. The Defendant Nixon denies, as to himself, the allegations contained in paragraphs 41–43 of the Second Amended Complaint.

WHEREFORE, the Defendant Nixon, having fully answered the allegations contained in the numbered paragraphs of the Second Amended Complaint, hereby prays that the Second Amended Complaint herein be dismissed.

Respectfully submitted,

/s/
WILLIAM G. HUNDLEY
CARY MARK FELDMAN
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Washington, D.C. 20006
Attorneys for Defendant Nixon

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

ANSWER TO SECOND AMENDED COMPLAINT BY DEFENDANT MITCHELL IN HIS INDIVIDUAL AND FORMER OFFICIAL CAPACITIES

Defendant John N. Mitchell, in his individual and former official capacities, by counsel, and in response to the Second Amended Complaint filed herein, says:

FIRST DEFENSE

The national security electronic surveillance of the telephone installation of the plaintiffs, located at 8215 Stone Trail Drive, Bethesda, Maryland, referred to in the Second Amended Complaint, was authorized by the President of the United States, acting through the Attorney General, in the exercise of his authority relating to the Nation's foreign affairs, and was conducted for foreign policy purposes and was deemed necessary to protect national security information against foreign intelligence activities and as such was lawful and not violative of any provision of the Constitution of the United States or the provision of any Federal statute.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

At all times material herein, all activities of the defendant Mitchell in the premises were performed in fur-

therance of his official duties, were within the scope of his authority, and were not in excess of his statutory authority. The aforesaid defendant Mitchell is, therefore, absolutely immune from civil liability therefor under the doctrine of official immunity.

FOURTH DEFENSE

The doctrine of sovereign immunity bars any suit against the United States where the United States has not consented to be sued. This suit is barred by the doctrine of sovereign immunity since it is in law and fact a suit against the United States to which the United States has not consented.

FIFTH DEFENSE

At all times material herein, all activities of the aforesaid defendant Mitchell in the premises were performed in the furtherance of his official duties, were undertaken in good faith and in the reasonable belief that such activities were necessary, lawful and within the scope of his authority. The aforesaid defendant Mitchell is, therefore, not liable to the plaintiffs in damages for such activity.

SIXTH DEFENSE

The Second Amended Complaint fails to state a claim upon which relief can be granted.

SEVENTH DEFENSE

The claim of the plaintiffs is barred by the Statute of Limitations.

EIGHT DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Second Amended Complaint, the defendant Mitchell avers:

1. The defendant Mitchell admits that the action purports to be as alleged in the first two sentences of paragraph 1 of the Second Amended Complaint, but denies that he has taken any action in violation of the plaintiffs' constitutional or statutory rights. The defendant Mitchell denies the allegations contained in the third sentence of paragraph 1 of the Second Amended Complaint.

2–4. the defendant Mitchell admits, on information and belief, the allegations contained in paragraphs 2–4 of the Second Amended Complaint.

5. The defendant Mitchell admits, on information and belief, the allegations contained in paragraph 5 of the Second Amended Complaint and that the plaintiffs purport to sue defendant Kissinger individually and in his official capacity.

6. The defendant Mitchell admits, on information and belief, the allegations contained in paragraph 6 of the Second Amended Complaint and that the plaintiffs purport to sue defendant Nixon in his individual capacity.

7. The defendant Mitchell admits the allegations contained in paragraph 7 of the Second Amended Complaint and that the plaintiffs purport to sue him individually and in his former official capacity. Defendant Mitchell denies that any action has been taken by him against plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further denies that the plaintiffs are entitled to judicial relief against him in any form or manner.

8 and 9. The defendant Mitchell admits, on information and belief, the allegations contained in paragraphs 8 and 9 of the Second Amended Complaint, and that the plaintiffs purport to sue each of those named defendants in their individual and former official capacities.

10. The defendant Mitchell, on information and belief, denies that defendant Haig is an Assistant to the President, but defendant Mitchell admits, on information and belief, that defendant Haig was formerly Deputy Assistant to the President of the United States for National Security Affairs, and formerly Military Assistant to defendant Kis-

singer, and was residing at the time this action was initiated at Fort McNair, Washington, D.C., and that plaintiffs purport to sue defendant Haig in his individual and official capacities.

11. The defendant Mitchell admits, on information and belief, that until his retirement on June 30, 1973, defendant Sullivan was the Director of the Office of National Narcotics Intelligence of the United States Department of Justice and that he formerly served as Assistant to the Director of the Federal Bureau of Investigation, and that the plaintiffs purport to sue him in his individual and former official capacities, but denies the remaining allegations contained in paragraph 11 of the Second Amended Complaint.

12. The defendant Mitchell admits, on information and belief, the allegations contained in Paragraph 12 of the Second Amended Complaint, and that the plaintiffs purport to sue defendant Mardian in his individual and former official capacity.

13. The defendant Mitchell admits, on information and belief, the allegations contained in paragraph 13 of the Second Amended Complaint.

14. The defendant Mitchell admits, on information and belief, that defendant Magruder is a former Special Assistant to the President, but denies, on information and belief, that he is presently serving a prison term. The defendant Mitchell admits that plaintiffs purport to sue the defendant in his individual and former official capacities.

15. The plaintiffs may not properly sue "John Doe" and "Richard Roe" defendants. Accordingly, the defendant Mitchell is not required to respond to the allegations contained in paragraph 15 of the Second Amended Complaint. If an action may properly be brought against such unnamed persons, the defendant Mitchell admits, on information and belief, that Special Agents of the Federal Bureau of Investigation acted in the premises at the behest of certain of the Federal defendants, as stated hereafter, but denies that any Special Agent so acting has taken any action against the plaintiffs which is actionable in a

suit for violation of their constitutional or other legal rights and further denies that plaintiffs are entitled to judicial relief against such unnamed persons in any form or manner.

16. The plaintiffs may not properly sue "James Poe" or "Richard Doe" defendants. Accordingly, the defendant Mitchell is not required to respond to the allegations contained in paragraph 16 of the Second Amended Complaint. If an action may properly be brought against such unnamed persons, the defendant Mitchell denies, on information and belief, that any agents of the Executive Department of other governmental agencies have taken any action against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further denies that plaintiffs are entitled to judicial relief against such unnamed persons in any form or manner.

17. The defendant Mitchell admits the allegations contained in paragraph 16 of the Second Amended Complaint but, on information and belief, denies that any action has been taken by defendant Chesapeake and Potomac Telephone Company against the plaintiffs which is actionable in a suit for violation of their constitutional or other legal rights and further denies that plaintiffs are entitled to judicial relief against such defendants in any form or manner.

18. The defendant Mitchell admits, on information and belief, that in May, 1969, defendant Kissinger, acting in his official capacity as Assistant to the President for National Security Affairs, communicated to the Director of the Federal Bureau of Investigation the fact that on a number of occasions in the preceding weeks, information relating to foreign policy initiatives and to the national defense had appeared in the news media; that the disclosure of such information could cause damage to the national defense,; that the disclosure of such information had not been authorized by officials of the United States who had the authority to do so; that the authorized access to such information was limited to a few officials and employees of the United States; that continued disclosures of

such information could severely impair the ability of the President to conduct foreign policy and could damage the national security of the United States; that it was the direction of the President of the United States that the Director of the Federal Bureau of Investigation cause to be made an investigation, using every lawful means, to determine the source or sources of the unauthorized disclosures of such information; that the defendant Kissinger would provide the Director of the Federal Bureau of Investigation the names of certain officials and employees of the United States who had access to such information. The defendant Mitchell denies all allegations contained in paragraph 18 of the Second Amended Complaint inconsistent herewith.

19. The defendant Mitchell admits, on information and belief, that in May, 1969, defendant Kissinger, acting in his official capacity as Assistant to the President for National Security Affairs, communicated to the Director of the Federal Bureau of Investigation the fact that on a number of occasions in the preceding weeks, information relating to foreign policy initiatives and to the national defense had appeared in the news media; that the disclosure of such information could cause damage to the national defense; that the disclosure of such information had not been authorized by officials of the United States who had the authority to do so; that the authorized access to such information could severely impair the ability of the President to conduct foreign policy and could damage the national security of the United States; that it was the direction of the President of the United States that the Director of the Federal Bureau of Investigation cause to be made an investigation, using every lawful means, to determine the source or sources of the unauthorized disclosures of such information; that defendant Kissinger would provide the Director of the Federal Bureau of Investigation the names of certain officials and employees of the United States who had access to such information. The defendant Mitchell admits, on information and belief, that

one of the names provided the Director of the Federal Bureau of Investigation by defendant Haig at the direction of defendant Kissinger was that of plaintiff Morton H. Halperin and that thereafter, based upon this and other information in the possession of the defendant and the Federal Bureau of Investigation, agents of the Federal Bureau of Investigation installed an electronic surveillance device upon the telephone of plaintiff Halperin located at his residence at 8215 Stone Trail Drive, Bethesda, Maryland. The defendant Mitchell denies all allegations contained in paragraph 19 of the Second Amended Complaint inconsistent herewith.

20. The defendant Mitchell admits that on May 12, 1969, a memorandum was transmitted from the Director of the Federal Bureau of Investigation to defendant Mitchell, then Attorney General of the United States, requesting written authorization for the installation of a telephone surveillance upon the telephone located at the residence of plaintiff Morton H. Halperin at 8215 Stone Trail Drive, Bethesda, Maryland, for the purpose of monitoring the wire communications of the plaintiff, and that on May 12, 1969, written approval for such surveillance was granted by defendant Mitchell. The defendant Mitchell further admits that no application for a judicial order or warrant for such surveillance was either sought or procured by any of the Federal defendants. The defendant Mitchell denies all allegations contained in paragraph 20 of the Second Amended Complaint inconsistent herewith.

21. The defendant Mitchell admits that pursuant to the direction of the President of the United States, a telephone surveillance was installed on the telephone at the residence of plaintiff Morton H. Halperin on May 9, 1969, and that such surveillance was conducted by agents of the Federal Bureau of Investigation. The defendant Mitchell denies all allegations contained in paragraph 21 of the Second Amended Complaint inconsistent herewith.

22. The defendant Mitchell admits that following the authorization of such a surveillance by the President of the United States, the telephone surveillance of the plaintiffs

was instituted on May 9, 1969, three days prior to the signing of the written authorization for such surveillance by defendant Mitchell. The defendant Mitchell denies all allegations contained in the first sentence of paragraph 22 of the Second Amended Complaint inconsistent herewith. The defendant Mitchell denies the allegations contained in the second sentence of paragraph 22 of the Second Amended Complaint.

23. The defendant Mitchell admits the allegations contained in paragraph 23 of the Second Amended Complaint.

24. The defendant Mitchell, admits that agents of the Federal Bureau of Investigation, with the assistance of defendant Chesapeake and Potomac Telephone Company, continued the telephone surveillance of the plaintiffs' residence from May 9, 1969, until February 10, 1971. The defendant Mitchell denies all allegations contained in paragraph 24 of the Second Amended Complaint inconsistent herewith.

25. The defendant Mitchell lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 of the Second Amended Complaint.

26. The defendant Mitchell admits the allegations contained in the first sentence of paragraph 26 of the Second Amended Complaint. The defendant Mitchell further admits that during the course of the telephone surveillance of the plaintiffs' residence, summaries of the overhears of certain of their conversations were made available to defendants Kissinger, Haldeman and Haig by the Federal Bureau of Investigation through the assistance of the then Director, J. Edgar Hoover, but denies all allegations contained in the second sentence of paragraph 26 of the Second Amended Complaint inconsistent herewith.

27. The defendant Mitchell, admits that during the lawful telephone surveillance of the plaintiffs' residence, summaries of certain of the overhears of the conversations of the plaintiffs were periodically made available to defendants Kissinger, Haldeman and Haig for their examination and use, and that such summaries were prepared or

caused to be prepared by defendant Sullivan and others. The defendant Mitchell denies all allegations contained in paragraph 27 of the Second Amended Complaint inconsistent herewith.

28–31a. The defendant Mitchell lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 28–31a of the Second Amended Complaint.

32. The defendant Mitchell denies the allegations contained in paragraph 32 of the Second Amended Complaint.

33. The defendant Mitchell lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the Second Amended Complaint.

34. The defendant Mitchell denies that the information set forth in paragraph 34 of the Second Amended Complaint accurately quotes the language contained in portions of the July 12, 1974, letter from defendant Nixon to Senator J. William Fulbright, or that the quoted information represents the full text of such letter, but that for the purposes of this action admits that the quoted language reflects what it purports to represent.

35. The defendant Mitchell admits that from May, 1969, until September 19, 1969, plaintiffs communicated their views in telephone conversations with associates and others, but other than aforesaid, lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the first sentence of paragraph 35 of the Second Amended Complaint. The defendant Mitchell admits that from May, 1969, until September 19, 1969, overhears of plaintiffs' telephone conversations were periodically summarized and that such summaries were made available to defendants Kissinger, Haldeman, Haig and other based upon the continuing telephone surveillance of the plaintiffs' residence during the period in question, but denies all allegations contained in the second sentence of paragraph 35 of the Second Amended Complaint inconsistent herewith.

36. The defendant Mitchell admits that the lawful interception, disclosure and use of conversations overheard on the telephone located at the plaintiffs' residence continued from May 9, 1969, until February 10, 1971, but denies all allegations contained in the first sentence of paragraph 36 of the Second Amended Complaint inconsistent herewith. The defendant Mitchell admits the allegations contained in the second and third sentences of paragraph 36 of the Second Amended Complaint. The defendant Mitchell admits that the telephone surveillance of the plaintiffs' residence was instituted pursuant to the authorization of the President of the United States and was conducted under the supervision of defendant Sullivan and others, and that summaries of the overhears of such surveillance were, during the course of such surveillance, periodically made available to Federal defendants Kissinger, Haldeman and Haig but denies all allegations contained in the fourth sentence of paragraph 36 of the Second Amended Complaint inconsistent herewith.

37. The defendant Mitchell admits that a December 29, 1969, letter from J. Edgar Hoover, then Director of the Federal Bureau of Investigation to then President Richard M. Nixon stated *inter alia* that "Halperin was recently in contact with an unidentified individual who told Halperin that he had received a call from Clark Clifford. Clifford is probably identical with the former Secretary of Defense. According to this individual he and Clifford discussed an article which Clifford may be preparing. * * * This individual then discussed the fact that he had to submit an outline of the article and an introduction of it to Clifford." The defendant Mitchell lack knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 36 of the Second Amended Complaint, other than as set forth above.

38. The defendant Mitchell denies, as to himself, the allegations contained in paragraph 38 of the Second Amended Complaint.

39 and 40. The defendant Mitchell lacks knowledge or information sufficient to form a belief as to the truth of the

allegations contained in paragraphs 39 and 40 of the Second Amended Complaint.

41. The defendant Mitchell admits, as to himself, that any disclosure or use by him of the telephone conversations of the plaintiffs was made with the knowledge that such communications had been obtained by electronic surveillance of the plaintiffs' telephone, but denies all other allegations contained in paragraph 41 of the Second Amended Complaint.

42 and 43. The defendant Mitchell denies, as to himself, the allegations contained in paragraphs 42 and 43 of the Second Amended Complaint.

WHEREFORE, the defendant Mitchell, having fully answered the allegations contained in the number paragraphs of the Second Amended Complaint, hereby prays that the Second Amended Complaint herein be dismissed.

Respecfully submitted,

WILLIAM G. HUNDLEY
PLATO CACHERIS
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS

v.

HENRY A. KISSINGER, ET AL., DEFENDNATS

ANSWER TO SECOND AMENDED COMPLAINT BY DEFENDANT HALDEMAN

Comes now defendant H.R. Haldeman, by his undersigned attorneys, and in answer to the Second Amended Complaint filed herein, says:

FIRST DEFENSE

The national security electronic surveillance of the telephone installation of the plaintiffs, located at 8215 Stone Trail Drive, Bethesda, Maryland, referred to in the Second Amended Complaint, was authorized by the President of the United States, acting through the Attorney General, in the exercise of his authority relating to the Nation's foreign affairs, and was conducted for foreign policy purposes and was deemed necessary to protect national security information against foreign intelligence activities and as such was lawful and not violative of any provision of the Constitution of the United States or the provision of any Federal statute.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

At all times material herein, all activities of defendant Haldeman in the premises were performed in furtherance

of his official duties, were within the scope of his authority, and were not in excess of his statutory authority. Defendant Haldeman is, therefore, absolutely immune from civil liability therefor under the doctrine of official immunity.

FOURTH DEFENSE

The doctrine of sovereign immunity bars any suit against the United States where the United States has not consented to be sued. This suit is barred by the doctrine of sovereign immunity since it is in law and fact a suit against the United States to which the United States has not consented.

FIFTH DEFENSE

At all times material herein, all activities of defendant Haldeman in the premises were performed in furtherance of his official duties, were undertaken in good faith and in the reasonable belief that such activities were necessary, lawful and within the scope of his authority. Defendant Haldeman is, therefore, not liable to the plaintiffs in damages for such activity.

SIXTH DEFENSE

The Second Amended Complaint fails to state a claim against defendant Haldeman in either his official or individual capacities upon which relief can be granted.

SEVENTH DEFENSE

The claim of the plaintiffs is barred by the Statute of Limitations.

EIGHTH DEFENSE

The Court lacks jurisdiction over defendant Haldeman for the reason that service of process upon him was invalid.

NINTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Second Amended Complaint, defendant Haldeman says:

1. That he is not required to answer the legal conclusions set forth in paragraph 1, and he denies that the amount in controversy, exclusive of interest and costs, exceeds $10,000.

2–4. Defendant Haldeman admits that plaintiff Morton H. Halperin was Assistant to the defendant Kissinger and later an Assistant Deputy Secretary of Defense, but he is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraphs 2–4.

5. Admitted, except for the last sentence, as to which no answer is required.

6. Admitted, except for the last sentence, as to which no answer is required.

7. Admitted, except for the last sentence, as to which no answer is required.

8. Defendant admits that he is a former Assistant to the President of the United States; and he is not required to answer the last sentence of said paragraph. Defendant denies that his residence at the time this action was initiated was 2402 R Street, N.W., Washington, D.C.

9. Defendant Haldeman admits the allegations pertaining to defendant Ehrlichman's employment, but is without knowledge or information sufficient to form a belief as to the allegations pertaining to John Ehrlichman's residence. No answer is required to the last sentence of paragraph 9.

10. Defendant Haldeman admits that Alexander Haig formerly held the positions described in paragraph 10 but is without information sufficient to form a belief as to the residence of Alexander Haig at the time the action was initiated. Defendant is not required to answer the last sentence of paragraph 10.

11. Defendant Haldeman admits that William Sullivan formerly held the positions ascribed to him in paragraph 11, but is without information or knowledge sufficient to form a belief as to his residence, and is not required to answer the last sentence of paragraph 11.

12. Defendant Haldeman admits that Robert Mardian formerly held the positions ascribed to him in paragraph 12, but is without information as to his residence, and is not required to answer the last sentence of paragraph 12.

13. The first sentence of paragraph 13 is admitted; no response is required to the second sentence thereof.

14. Defendant Haldeman admits that defendant Magruder is a former Special Assistant to the President, and is not required to answer the last sentence of paragraph 14. The residence alleged for defendant Magruder is denied.

15 and 16. No response is required to paragraphs 15 and 16.

17. On information and belief, admitted.

18. Defendant Haldeman, on information and belief, incorporates herein the first two sentences of the answer of federal defendant Kissinger to the second amended complaint and, in further answer, defendant Haldeman denies that he initiated electronic surveillance of plaintiffs. Defendant Haldeman denies all allegations contained in paragraph 18 of the second amended complaint not specifically answered herein.

19. Defendant Haldeman lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 of the second amended complaint.

20. Defendant Haldeman denies that he initiated an electronic surveillance of plaintiffs' residence telephone and he is without information sufficient to form a belief as to the administrative procedures which were followed by the others named in paragraph 20 in connection with the electronic surveillance at plaintiffs' residence, which defendant Haldeman believes was conducted with valid authority. Defendant Haldeman denies all allegations con-

tained in paragraph 20 of the second amended complaint which are not specifically answered herein.

21. Defendant Haldeman denies that he directed or procured the installation of an electronic surveillance upon the home telephone of the plaintiffs, but on the basis of knowledge and information he believes such a device was installed by persons not known to him.

22–25. Defendant Haldeman is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraphs 22–25 of the second amended complaint.

26–27. Defendant Haldeman admits that he received reports of electronic surveillances but he has no specific recollection of reports of electronic surveillance of plaintiffs' home telephone. Defendant Haldeman is without knowledge or information sufficient to form a belief as to which of the defendants, if any, intercepted such conversations, and denies that the surveillance was illegal or that he procured disclosure of reports of such interceptions.

28. Defendant Haldeman does not recall being in the meeting described in paragraph 28 of the second amended complaint, and he lacks information sufficient to form a belief as to whether he was present at such meeting. On information and belief, defendant Haldeman believes that the instructions referred to in said paragraph 28 were given. Defendant Haldeman is without knowledge or information to further answer the remaining allegations of paragraph 28.

29, 30, 31, 31A, 32, 33, 34. Defendant Haldeman is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 29, 30, 31, 31A, 32, 33, and 34 of the second amended complaint.

35. Defendant Haldeman has no specific recollection of reports pertaining to the plaintiffs in the period alleged, and it is his belief that he did not receive such reports. Defendant is without knowledge or information sufficient to form a belief as to the second sentence of paragraph 35 of the second amended complaint.

36. Defendant Haldeman denies that he acted illegally as alleged in the first sentence of paragraph 36 and he is without knowledge or information sufficient to form a belief as to the period of the surveillance and as to the matters alleged in the second, third and fourth sentences of paragraph 36 except that he acknowledges that he may have received some reports pertaining to the electronic surveillance of plaintiffs' residence during some part of the period referred to in paragraph 36 of the second amended complaint.

37. Defendant Haldeman admits learning on January, 1970, that Clark Clifford was to write an article for Life Magazine which would be strongly against the United States Vietnamese policy and that he made comments with regard to suggestions of defendant Magruder concerning a response to such criticism. Defendant Haldeman lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first two sentences of paragraph 37 of the second amended complaint other than as herein stated. Defendant Haldeman denies the last two sentences of paragraph 37 of the second amended complaint.

38. Denied.

39, 40. Defendant Haldeman is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 39 and 40.

41, 42, 43. Denied.

Defendnat Haldeman denies each and every allegation of the complaint to which he has not specifically responded herein.

WHEREFORE, defendant Haldeman prays that he have judgment against each plaintiff, that the second

amended complaint be dismissed, and that he be awarded costs and reasonable attorneys' fees.

/s/ _____
JOHN J. WILSON

/s/ _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 1975, a true copy of the foregoing answer was mailed first class postage prepaid to each of the following:

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FRANK H. STRICKLER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-3070

THOMAS REESE, ET AL., PLAINTIFFS,

v.

RICHARD M. NIXON, ET AL., DEFENDANTS.

MEMORANDUM

[May 3, 1974]

Appeal from the United States District Court for the Central District of California

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Before ELY, HUFSTEDLER and SNEED, Circuit Judges

The district court erred in dismissing this civil rights action without leave to amend. Although the complaint's general allegations of conspiracy, purpose, intent, and color of authority are vague, conclusory, and rambling, they are adequate to withstand a motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure. A civil rights action may not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41. . . ." (*Cohen v. Norris* (9th Cir. en banc 1962) 300 F.2d 24, 32; *accord*, *Haines v. Kerner* (1972) 404 U.S. 519). The complaint does fail to set forth the overt acts of the defendants in furtherance of the objects of the conspiracy. (*Hoffman v. Halden* (9th Cir. 1959) 268 F.2d 280, 295-96, *overruled on other grounds*, *Cohen v. Norris*, *supra*.) However, to

the extent that further particularity is needed, the defendants can move for a more definite statement under Rule 12(c), Federal Rules of Civil Procedure.

Even if the motion to dismiss had been properly granted, the district court abused its discretion in rejecting appellants' request to amend the complaint. (*See generally Foman v. Davis* (1962) 371 U.S. 178.)

The district court properly dismissed the fictitiously named defendants under Rule 4(j) of the Local Rules of the United States District Court, Central District.

We do not reach the question whether the district court has power to assert jurisdiction over the President because we agree with the district court that no claim for relief has been or can be stated against the President under the doctrine of executive immunity explicated in *Barr v. Matteo* (1959) 360 U.S. 564 and *Scheuer v. Rhodes* (1974). . . . U.S.. . . . (*See also Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (3d Cir. 1972) 456 F.2d 1339.)

The doctrine of executive immunity, however, is inadequate at this stage of the case to insulate the remaining federal and state officials named as defendants. Executive officials do not possess an absolute and comprehensive immunity as to all acts allegedly performed within the scope of their official duty (*Scheuer v. Rhodes, supra, at. . . .*) An official is immune only if he performs "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority" (*Barr v. Matteo, supra* at 575 (Harland, J.)) and only when the act complained of is "within the outer perimeter of [his] line of duty" (*id.*). A determination as to the applicability of executive immunity to the named defendants other than the President cannot be made in the absence of a factual record, because the extent of the qualified immunity to which the defendants are entitled depends upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which lia-

bility is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct." (*Scheuer v. Rhodes, supra* at. . . .) The record is far too unclear presently to ascertain which official or officials acted within the range of discretion permitted the holders of particular offices and acted in good faith. The plaintiffs are entitled to be heard more fully than is possible on a motion to dismiss a complaint. (*See id.* at. . . .)

The prosecutors are not immunized from suit unless the acts complained of took place as an integral part of judicial process. (*Donovan v. Reinbold* (9th Cir. 1970) 433 F.2d 738, 743-44; *Robichaud v. Ronan* (9th Cir. 1965) 351 F.2d 533, 536.) Until the record is more fully developed, it is not possible to determine whether immunity extends to the prosecutors named as defendants.

The record is also too poorly developed to sustain a conclusion that abstention is appropriate in respect of defendant Flournoy. The suggestion that defendant Flournoy is being sued for his role as state tax collector in the process of collecting taxes is no more than conjecture.

Affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with the views herein expressed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 5-7-74—480

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 73-2442-MML

Order Dismissing Action as to the President of the United States

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JANE FONDA, PLAINTIFF,

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS.

On behalf of Richard M. Nixon, President of the United States, the United States Attorney and the Department of Justice have moved for an order quashing the service of process upon the President and have suggested the dismissal of the action with regard to the President. This Court held a hearing on that motion on April 8, 1974. After considering the pleadings filed, the record, and the arguments of counsel, this Court has rendered an opinion on the matter. In accordance with that opinion, rendered on May 23, 1974, this Court hereby

ORDERS:

1. The motion to quash the service of process is denied.

2. The action is dismissed as to Richard M. Nixon, President of the United States, with prejudice.

3. The Court finds that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

4. Each side shall bear its own costs.

Dated: May 23, 1974

/s/ _____

]MALCOLM M. LUCAS
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 73-2442-MML

JANE FONDA, PLAINTIFF,

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS.

OPINION REGARDING SERVICE OF PROCESS UPON THE PRESIDENT OF THE UNITED STATES

Jane Fonda, the well-known actress and critic of United States activity in Southeast Asia, began this suit in October 1973 to obtain remedies for the alleged infringements of her civil rights by government officers. Unlike many civil rights cases, brought against local government officials or minor federal officers, this one seeks redress against present or former high-level federal law-enforcement officers, members of the Cabinet, advisers to the President, and the President of the United States.

Fonda contends that the defendants conspired among themselves to deprive her of her civil rights. The complaint does not exhaustively delineate the conspiracy, but the plaintiff has furnished some details about her claim. According to Fonda, Presidential advisers drafted the Huston Plan, which the President approved, to encourage government action against political dissidents.[1] The Huston Plan is described in some White House documents, first revealed publicly during the Watergate investiga-

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[1] The specific details appear in an affidavit filed by Leonard I. Weinglass, one of Fonda's attorneys, in opposition to a motion by Huston for dismissal. An unsigned copy was filed on March 4, 1974; the signed copy, with corrections, was filed on March 5, 1974.

tion.[2] As outlined in these documents, the plan included an increase in electronic surveillance of persons in the United States who posed a threat to internal security, relaxation of restrictions on legal mail coverage and on covert mail coverage, removal of barriers to surreptitious entry of facilities occupied by persons, an increase in coverage of campus activity, and other measures. Some portions—specifically the surreptitious entry and covert mail coverage—were recognized as illegal. The Huston Plan is not the only action taken at the White House by which Fonda claims to have been affected. Fonda's name allegedly appeared in an "enemies list" at the White House, and memoranda concerning her were allegedly present in White House files. By these steps and perhaps by other maneuvers, Fonda claims, the officials at the White House either commanded the specific wrongs done to her or directed activity that established a pattern or practice of anti-dissident measures leading to these wrongs, or tolerated the custom of taking those measures against dissidents.[3]

The specific events described as wrongs done to her include seizure of her personal papers, opening of her mail, electronic surveillance of her telephone calls, procurement of information from her bank records, and placement of false telephone calls to her to investigate her family's activities. These occurrences allegedly interfered with her exercise of her civil rights and civil liberties.

As relief she seeks compensatory damages, punitive damages from each defendant, an injunction, a declaratory judgment, and a writ of mandamus. The demand for damages forms a major part of the action and the demand is for a considerable sum, a total of several million dollars.

From Richard M. Nixon, President of the United States, she demands relief of every kind, including damages. On President Nixon's behalf the government has moved for an order quashing the service of process upon

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[2] Copies are attached to the Weinglass affidavit.

[3] See ¶42 of the complaint.

him. Added to the motion is a request denominated as "suggestion for dismissal of this action as to the President of the United States," in which the government contends that this Court should dismiss the action on the Court's own motion.

The government contends that a United States court, organized pursuant to Article III of the Constitution, has no jurisdiction to entertain an action against the President. The government views him as immune from the judicial process itself, not merely possessed of defenses on the merits against the action to be instituted, except in limited and narrowly defined circumstances. In support of the claim to immunity, the government cites the doctrine of separation of powers. The government also argues that subjection of the President to the legal process in suits for damages, injunctive relief, or declaratory relief would influence his administration of office and restrict his independence, in derogation of the Framers' design that there should be no infringement on his will and resolution. Such suits would not only dampen his ardor, but would also consume his personal time, the government fears, and with some justification. Consequently it urges not merely a dismissal on the ground that no relief can be obtained, but dismissal on the broader ground that no action can even be instituted.

By discussing the separation of powers, the government invokes the principle, included in the political question doctrine, that some matters are committed exclusively to branches of the government other than the judiciary. The government's argument resolves itself into the alternative contentions that a suit against the President necessarily concerns the use of power committed to that office or that the suit necessarily concerns the exercise of discretion belonging to that office.

Although a few cases do suggest that the judicial power does not extent to cases involving the President's power, those cases must be read carefully. In the early case of *Kendall v. United States*, 37 U.S. (12 Peter 524, 610 (1838), the court did proclaim:

> The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.

This discussion of Presidential power was not entirely necessary, since the President was not a party and the case did not concern Presidential conduct.[4] Nor should the quoted language be read as a statement that persons exercising powers granted by the Constitution are exempt from the legal process of the judiciary. The official whose action was the subject of the suit, the Postmaster-General, tried to shroud himself with Presidential prerogatives by claiming that only the President could exert direction and control over him, so that the judiciary could not order him to take action. The court flatly rejected that contention:

> It would be vesting in the president a dispensing power, which has no countenance for its support, in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the president with a power entirely to control the legislation of congress and paralyze the administration of justice.

Id., 611. In so ruling, the court was implicitly declaring itself empowered to take jurisdiction and decide whether a particular function was one within the exclusive domain of the executive. The court's statement quoted earlier in the paragraph should be read in context to mean that the courts, taking jurisdiction, will decline to issue remedies interfering with certain executive powers, not that the court's process fails to reach the executive branch.

A good example of the political question doctrine, involving the exercise of Presidential power, is *Hobson v. Tobriner*, 255 F. Supp. 295 (D.D.C. 1966), cited by the government. There the plaintiff filed a civil rights action

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[4]The official involved, the Postmaster General, did not have only Constitutional functions. The court held that he had statutory powers as well. The statutory powers were certainly subject to control through mandamus, the remedy sought in the case.

to enjoin the appointment of commissioners for the government of the District of Columbia and to order elections instead. The court said that the relief demanded would invade the political power of Congress and the duty of the President. This decision reflects a judgment about the nature of the power committed to the President and the impropriety of relief, not merely a recognition that the President was involved. It does not reflect that belief that the mere presence of the President paralyzes the courts. Like *Kendall*, it treats the separation of powered concept as a factor going to the judicial remedies rather than the availability of the judicial process.

Closely related to the argument that a power is reserved to the President is the contention that in certain matters he has a discretion reserved to him. This is reflected in the traditional doctrine that the judiciary can control ministerial functions, but not discretionary ones, mandamus or similar remedies. The use of Presidential discretion was the subject in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), another case cited by the government. The State of Mississippi sued to enjoin the President from executing the Reconstruction Acts, on the theory that they were unconstitutional. In reply the Attorney General argued explicitly that the suit was defective because the President could not be served with process. The court held that the President could not be enjoined, even if he could be sued, because that suit would interfere with his discretion in enforcing the law. Analogizing a suit to enjoin action to a suit for mandamus to compel action,[5] the court ruled that injunctive relief would not be issued to restrain the exercise of discretion just as a mandamus would not be issued to compel performance of a discretionary duty. The court never reached the question about service of process. Like cases about

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[5]The analogy is now rather doubtful. Injunctions can be used to restrain officials from executing a law when that law is unconstitutional. E.g., *Ex Parte Young*, 209 U.S. 123 (1908). The courts do not accept the theory that an officer has discretion to decide whether a law is valid. The courts decide it for him.

discretionary duty, *Mississippi v. Johnson* turned on the nature of the duty, not the fact that the President had that duty,[6] and it concerned relief rather than the service of process.

Landmark cases like *Kendall* and *Mississippi v. Johnson*, often cited in support of Presidential immunity, were really cases about remedies or subject matter only. The courts ruled only after consideration of the subject matter, the nature of the power and its exercise, not merely the identity of the defendant. The presence of a political question or other suggestions of a problem stemming from the separation of powers are matters going to the court's jurisdiction over the subject matter or to remedies, not one going to its power to serve process upon the President. This distinction was made in the recent cases of *National Treasury Employee Union v. Nixon*, No. 72- D.C. Cir-25, *Nixon v. Sirica*, 487 F.2d 700, 712 (D.C. Cir. 1978). It is implicit in *Minnesota Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1970).

The courts rather than the President will examine the power and decide whether the case involves political questions or unreviewable discretion. Even when a matter arguably is committed to another branch by the express language of the Constitution, the courts will inspect the subject matter to decide whether it fits the terms of the commitment. See *Powell v. McCormack*, 395 U.S. 486 (1969).

These statements imply the rejection of any notion that the nature of a political question has anything to do with the service of process. The judiciary will use its process against an official. If he prevails because there is a political question or unreviewable discretion, his victory is due to the nature of the subject matter, not to his identity as an official. If the court finds neither a political question nor unreviewable discretion to bar jurisdiction, the court can act against the President. *National Treasury Em-*

[6]The power of the President is not made discretionary simply because the President possess it. *National Treasury Employees Union v. Nixon*, *infra*.

ployees Union v. Nixon, supra; see *United States v. Burr*, 25 Fed. Cases 30 (No. 14,692d) (C.C.D. Va. 1807). Certainly after the recent decision in *National Treasury Employees Union v. Nixon* and *Nixon v. Sirica*, the courts will exert the judicial process against the President and leave the argument about the separation of powers to the determination of subject matter jurisdiction or the propriety of relief.[7]

If court action always interfered with the President's performance of duties, making the President less zealous

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[7] For the proposition that the President enjoys a total exemption from the jurisdiction of the courts, the government cites, in addition to *Hobson v. Tobriner* and *Mississippi v. Johnson*, the recent cases of *Davis v. Nixon*, No. 73-1520-LTL(G) (C.D. Cal., Nov. 29, 1973) (Lydick, J.); *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971); *Reese v. Nixon*, 347 F. Supp. 314 (C.D. Cal. 1972) (Hauk, J.), *aff'd on other grounds as to the dismissal of the action against the President*, No. 72-3070 (9th Cir. May 3, 1974) (unpublished opinion); and *Suskin v. Nixon*, 304 F. Supp. 71 (N.D. Ill. 1969). The judge in *Davis* wrote no opinion, and so there is no written description of his reasons for dismissal. In *San Francisco Redevelopment Agency*, a suit for mandamus to compel the release of money, the court dismissed the action against the President and quashed service of process because no authority supported the proposition that a court could compel Presidential action. The District of Columbia Circuit has subsequently provided that authority in *National Treasury Employees Union v. Nixon, supra*. To the extent that *San Francisco Redevelopment Agency* relates the questions above propriety of compelling action to the validity of service of process, is undercut by the recent District of Columbia Circuit cases distinguishing between the power to consider certain subjects and the service of process on the President. In *Reese*, the District Court decided it had no jurisdiction over the President because of the separation of powers, and in *Suskin*, the court quashed service of process because the power involved—that of formulating standards under the draft law—was discretionary. The recent District of Columbia decisions, distinguishing between problems with the subject matter and the service of process, undercut these opinions. The Court follows the recent District of Columbia rulings.

in his work and less effective in carrying out his *proper* Constitutional functions, that might be good reason to limit his exposure to suits. But interference with Presidential action is not always so deleterious. Some interference of one branch with another is a part of the system of checks and balances by which each branch restrains the others. As Justice Brandeis observed:

> The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293 (1927) (dissenting opinion). Action not in accordance with the Constitution or the statutes is not merely action beyond the declared limits of authority; as the District of Columbia Circuit said:

> . . . [T]here is serious questions whether presidential actions inconsistent with congressional mandates constitute effective Government

National Treasury Employees Union v. Nixon, *supra*, 46. The interference may benefit the nation in the long run, and the Constitution looks to the long run.

A similar analysis applies to the contention that judicial action interferes with a President's electoral mandate. An electoral mandate may prescribe the policies to be followed in formulating regulations and implementing law or in recommending to Congress some changes in the law, but it provides no authority to brush aside the law and it especially provides none to brush aside Constitutional rights. The electoral mandate does not define the office or its powers, but merely instructs the occupant on how to perform the duties of office.[8] The occupant must work within the framework of the office. Judicial action re-

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[8]The government identifies the holder with the office. But the distinction between an office and its holder is a basic theme of the political history of the last several hundred years. The Court does not accept the government's view.

straining him to the confines of the office does not interfere with the genuine electoral mandate. A certain amount of interference with the President's activity may conceivably be desirable.

A corollary to that is the proposition, which the Court recognizes, that some lawsuits seek not to restrain actions which are in fact illegal, but to affect action that is in fact within the President's authority. If a court should render preliminary relief, such as a temporary restraining order or injunction, that would effectively stop the President from carrying out duties. The fear of a successful suit for damages would have a chilling effect on the President's vigorous performance of his functions. The potential effect on the President's action calls for safeguarding against the institution of suits which would affect him in his proper role. For that purpose the courts have developed devices such as the defense of official action. E.g., *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (2d Cir. 1972); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. den.*, 339 U.S. 949 (1950). The defense is not stated identically for each officer, and the range of activity swept within it varies considerably for each office. But the scope of the immunity is measured by the official's function, not by his identity. In *Barr v. Matteo* 360 U.S. 564, 573-4 (1950), the court said in this regard:

> It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of no "matters committed by law to his control or supervision," *Spalding v. Vilas, supra*, [161 U.S.] at 498,—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.

The defense does not entirely insulate an officer from a lawsuit, but only protects him from certain ones. The judiciary decides whether he has its protection in a particular case. In making the decision, the judiciary starts from the premise that the official is exposed to the judicial process. Within the legal process he has a shield against

the plaintiff's complaint, but he does not have a shield against the legal process itself.

The legal process does require the time and attention of litigants. If numerous suits were brought against a President, and especially if they were suits for money damages, the President might find his personal time consumed by conferences with counsel, by furnishing information and discovery, and by similar matters. More than any other official, the President has to have the maximum use of his working time. For this reason the courts have protected the President's time by preventing suits from going forward if the litigant has adequate recourse by suits against other officials. But like the defense of official immunity, this doctrine is not armor against the legal process but merely a part of the legal process to be applied. The distinction between a defense within the legal process and a defense to the process stands forth in Chief Justice Marshall's opinion as a Circuit Judge in *United States v. Burr*, 25 Fed. Cases 30 (No. 14,692d) (C.C.D. Va. 1807). On trial for treason, Burr sought a subpoena duces tecum to compel the President to produce a letter written by General Wilkerson and to the President, Thomas Jefferson. The court considered the relation of the subpoena to the use of the President's time and rejected consumption of time as a defense to the simple issuance of a subpoena:

> If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and if it should exist at the time when his attendance on a court is required, it would be shown on the return of the subpoena, and would rather constitute a reason for not obeying the process of the court than a reason against its being issued. . . . The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued.

The subpoena was issued, and Jefferson did provide the letter. The court recognized the President's needs and interests by preventing disclosure of much of the letter in open court. Marshall required him to trust the judicial machinery, not to ignore it.[9] His decision refutes the government's theory that consumption of the President's time is a ground for immunizing him totally from the judicial process itself.

The President is not sovereign; the nation is. Through the Constitution the nation did not give sovereign power to the President. Nor does his political mandate constitute a grant of sovereign power. *Nixon v. Sirica, supra; United States v. Burr, supra.* The tenets of a republican form of government include surely the principles that officers are distinct from their offices and that officers are subject to the law. As Justice Jackson remarked, "With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law. . . ." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 655 (1952) (concurring opinion), quoted in *Nixon v. Sirica, supra.* He is not above the command of the law, and no express guarantee in the Constitution exempts him from the conventional legal process. In *National Treasury Employees Union v. Nixon, supra,* and in *Nixon v. Sirica, supra,* the courts declared him subject to that process.

But as the Court has noted, the judiciary has developed techniques for the President to avoid the harassment of useless lawsuits. The concept of justiciability restricts their subject matter; the defense of official action protects officers acting within their authority. In addition, because the President's time is uniquely precious, the courts have been reluctant to permit a suit against him if a suit can be brought against another official instead. In the recent

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[9]To some extent, the language in *Burr* is undercut by the fact that a United States Attorney had conceded that a subpoena could be issued. The United States Attorney had denied only the propriety of issuing a subpoena duces tecum. The distinction between the two forms if flimsy, and Marshall noted that.

cases holding him subject to legal process and rendering decisions against him, the courts have observed that the President was in fact indispensable. In *Nixon v. Sirica* the President had interposed himself by taking personal control over the property sought in a subpoena. The court could give no relief except relief against the President. In *National Treasury Employees Union v. Nixon*, the petitioner sought mandamus to compel performance of a duty imposed on the President and not delegated by him to any subordinate; again the only possible relief was relief against the President.[10] But in both cases the courts adverted to the policy against unnecessary suits. In *Nixon v. Sirica*, *supra*, 709, the court said:

> As a matter of comity, courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President. Here, unfortuntely, the court's order must run directly to the President, because he has taken the unusual step of assuming personal custody of the Government property sought by the subpoena.

The District of Columbia Circuit underscored its distaste for unnecessary suits when it stated:

> There is also little doubt that if it were possible for NTEU to enforce its rights by naming a defendant additional to or in substitution of the President, this Court would exercise its discretion not to answer the question of whether the President is subject to mandamus by a federal court to perform a purely ministerial duty.

National Treasury Employees Union v. Nixon, *supra*, 35. Litigants have succeeded in keeping the President in a lawsuit only when no alternative slate of defendants was available.

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[10]The same was true in *Minnesota Chippewa Tribe v. Carlucci*, *supra*. Seeing no possible relief except relief against the President, Judge Green denied a defense motion to dismiss as to the President. However, the case has not proceeded to a decision on the merits, so far as the Court knows.

But in this action, a raft of defendants are present. The caption names twenty defendants besides Nixon, including two banks and a host of government officers. Since the activity that allegedly harmed Fonda necessarily involved persons besides Nixon, who could not possibly have committed the alleged torts alone, declaratory or injunctive relief or relief in the nature of mandamus will adequately protect Fonda if that relief runs against parties other than Nixon. In *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, the plaintiff obtained full relief against Presidential action by a suit against the subordinate implementing it. Fonda can obtain fully compensatory damages by pursuing the claims against other parties, some of which are obviously solvent and pecunious. Moreover, the United States itself may be vicariously liable under the Tort Claims Act[11] for torts committed by others in the conspiracy that allegedly operated. The plaintiff has not demon-

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[11] Conceivably, the actions by the alleged wrongdoers would be within the scope of their authority for the purposes of 28 U.S.C. § 2680 outside of the exceptions enumerated in 28 U.S.C. § 2630. Section 2680(h) does exclude claims such as assault, battery, false arrest, and malicious prosecution, but the alleged actions do not clearly fall within § 2680(h). As the Senate Government Operations Committee recently concluded, "[U]nder the Federal Tort Claims Act, Government tort liability for intentional conduct is unclear. For example, certain intentional torts such as trespass and invasion of privacy are not always excluded from Federal Tort Claims Act coverage." S. Report 93-588 (Nov. 29, 1973). This report is part of the legislative history behind P.L. 93-253, 88 Stat. 50 (March 16, 1974), which adds this language to § 2680(h):

> *Provided*, that with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising on or after the date of the enactment of this provision, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered

strated the need for having the President involved personally in this suit, and it appears that the plaintiff cannot demonstrate such need. This Court will dismiss, as to the President, any suit naming the President unless the party responsible for including him demonstrates that the President is indispensable, both legally and practically. He is not indispensable in this case, and the Court will dismiss the suit against him.

The plaintiff has argued for a stay of the action during the remainder of his tenure in office instead of a dismissal. Thereby the plaintiff hopes to keep the lawsuit alive and prevent the danger of the running of the statute of limitations. But the prolonged pendency of a suit can be just as damaging as the speedy prosecution of it. Lawsuits would pile up, evidence would disappear; and memories would grow stale, leaving the ex-President with a full-time job as litigant and with a handicap in conducting litigation. Obviously, this would be an intolerable burden, and the prospect of it would influence a President while in office. A stay of proceedings would not adequately protect the President.

The government's motion to quash the service of process is denied. Treating the "suggestion for dismissal" as a motion for dismissal of the action as to the President of the

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by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

This enactment was intended not merely to repeal the exception for most cases of the torts specifically listed in §2680(h), but also to clarify the status of torts not listed, such as invasion of privacy. "Obviously, it is the intent of the Committee that these border line cases under the present law, such as trespass and invasion of privacy, would be viewed as clearly within the scope of the Federal Tort Claims Act, if the amendment is adopted." S. Report 93-588. Although the new proviso applies by its own force only to cases arising after March 16, 1974, it may be a guide in interpreting the prior law about the non-listed forms. It is possible that the Government bears liability for the conduct behind Fonda's claims. The Court expresses no opinion on the matter.

United States, the Court grants that motion.[12] As against the President, the action is dismissed without leave to amend.

With its obvious political overtones, this case has the potential of attracting public attention. It would not be proper for such a case to be known by the name of a party no longer in it. The Court therefore strikes the name of Richard M. Nixon, President of the United States, from the caption. The case shall hereafter be designated "Fonda v. Gray, et al," the name of L. Patrick Gray being the one listed next in the caption.

In the event of a decision adverse to her, Fonda has requested a certification for an immediate appeal under 28 U.S.C. § 1292(b). The Court grants that request.

Dated May 23, 1974

/s/ _____

MALCOLM M. LUCAS
United States District Judge

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[12] The Court renders no opinion on whether the plaintiff could sue Nixon after he leaves office nor on the running or tolling of the statute of limitations. These questions are not before this Court. Nor does the Court express any opinion on whether President Nixon would be protected by the defense of official action.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 73-1520-LTL(G)

ELMER DAVIS, PLAINTIFF,

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

ORDER DISMISSING COMPLAINT AS TO CERTAIN DEFENDANTS

Pursuant to Title 28 U.S.C. §636(b)(3), attached is the Report and Recommendation of the United States Magistrate who has reviewed the complaint and amended complaint filed herein for relief under the Civil Rights Act, together with the motion to dismiss as to various defendants, and the plaintiff's opposition there.

The Court has reviewed the foregoing and the objections to the Report and Recommendation of Magistrate Ralph J. Geffen and concurs with and adopts the findings and conclusions of the Report and Recommendation.

IT IS ORDERED that the motion to dismiss the amended complaint is granted as to Defendant Richard M. Nixon, President of the United States of America, and that the motion to quash the service of summons on said defendant, and to strike his name from all pleadings is denied, without prejudice to renewal at a later date.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order by United States mail, upon the plaintiff, upon La Foliette, Johnson, Horgan & Robinson, counsel for defendants Cork, Campbell and Franklin, and upon the United States Attorney, counsel for the remaining defendants.

DATED: June 18, 1974.

/s/ _____

LAWRENCE T. LYDICK
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 73-1520-LTL(G)

ELMER DAVIS, PLAINTIFF,

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

REPORT AND RECOMMENDATION AS TO CIVIL RIGHTS COMPLAINT

Plaintiff, a state prisoner, appearing *in forma pauperis* and without counsel, has brought this civil rights action for damages against (A) the President of the United States, Richard M. Nixon, (B) four of the presidential "advisors", "aides" and "consultants", John D. Ehrlichman, Egil (sic) Krough, E. Howard Hunt, and G. Gordon Liddy, and (C) three officials of the Beverly Hills Police Department, B. L. Cork, Bruce Campbell, and W. L. Franklin.

Jurisdiction is alleged under provisions of the civil rights acts, 42 U.S.C. §§1983, 1985 and 1986 [*Haines v. Kerner*, 404 U.S. 529 (1972);] via 28 U.S.C. §§1331 and 1343(3) and (4), and may also be present under the Fourth and Fifth Amendments. [cf. *Bivens v. 6 Unknown Named Agents*, 403 U.S. 388 (1971) via 28 U.S.C. § 1331(a).

An order was made by the United States Marshal for service of the original complaint upon the defendants without prepayment of fees. However, service has not been accomplished as to any of them except the last-named group, and in the case of defendant Nixon the United States Marshal for the District of Columbia declined to make service on the grounds that he had "no authority to serve the President", and that "the President of the United States is not amenable to service of process and is not subject to any court for the exercise of his powers whether constitutional or statutory, political or otherwise."

An amended complaint was subsequently filed. No order for service thereof has been made, and it has not been served on any of the defendants excepting defendants Cork, Campbell and Franklin, who have filed an answer thereto.

On September 24, 1973, a Notice of Motion was filed by the United States Attorney on behalf of defendant Nixon

(1) seeking that service of summons directed to defendant Nixon be quashed, and

(2) suggesting that the action be dismissed as to defendant Nixon.

An amended Notice of Motion to the same effect was filed by the United States Attorney on behalf of defendant Nixon on October 17, 1973. Although this preceded the filing of the amended complaint, an order was made by the Magistrate on November 17, 1973 that this motion remain on calendar. Hearing was had thereon on November 26, 1973. Plaintiff did not appear and was not represented, but did file opposition to the motion, presenting a well-drawn memorandum of points and authorities in support of his position.

The scope of the hearing was confined to an explanation by the United States Attorney of the legal grounds relied upon for his motion. They included the following points:

(1) A federal officer is not liable to suit under 42 U.S.C. §§1983 or 1985;

(2) The President is immune from civil suit for acts within the scope of his authority;

(3) There is no jurisdiction of the action because diversity of citizenship is not alleged.

Of these, (1) and (2) were specified in the notice of motion.

A great deal of research has been done as to the principle that the separation of power doctrine militates against the assertion of jurisdiction by the judicial branch over the person of the head of the Executive Branch. This Court has stated that principle in *Reese v. Nixon*, 347 F. Supp. 314 (C.D. Cal. 1972), affirmed and reversed, in parts,

#72-3070, unpublished Memorandum, May 3, 1974. Accord, *San Francisco Redevelopment Agency v. President Richard M. Nixon*, 329 F. Supp 672 (N.D., Cal. 1971); *National Association of Internal Revenue Employees v. Nixon*, 349 F. Supp. 18 (D.D.C. 1972); *Trimble v. Johnson*, 173 F. Supp. 651 (D.D.C. 1959).

An analysis of the first cause of action of the amended complaint, which, as a *pro se* pleading, is to be liberally construed [*Haines v. Kerner*, 404 U.S. 519 (1972)], indicates that it charges only defendants Cork, Campbell and Franklin with any conduct. The conduct complained of is that these defendants, under color of state and federal law, invaded plaintiff's right of privacy by publicly making false statements that plaintiff had confessed to burglary of the offices of a Dr. Lewis J. Fielding (the "Ellsburg burglary"), with intent to cause his false arrest and imprisonment and involve him in such "scandal", in violation of his rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution; as a result, plaintiff alleges, he was humiliated and sustained mental pain and suffering. (Amend. Complt., p. 1-p, 5, 1, 12.)

The second cause of action includes claims against *all* of the defendants. It designates defendant Nixon as the President of the United States, defendant John D. Ehrlichman as "Presidential Aide", and defendants E. Howard Hunt and G. Gordon Liddy as "Presidential Aides and Consultants"; the four last-named are described as "officials of the United States Government in an appointive capacity." (Amend. Complt., p. 5. 11, 15-19; p. 1, 1. 1-p. 2, 11. 1-6, 16-31.) All of the defendants are alleged to have acted under the color of state and federal law. (Amend. Complt., p. 3, 11. 8-11.)

The second cause of action, imperfectly drawn, clearly intends to charge a conspiracy by all defendants, directed at plaintiff, to make plaintiff a "scapegoat" "to cover for themselves in their own criminal acts of conspiracy to commit" the so-called "Ellsburg burglary" by "falsely accusing the Plaintiff of having 'confessed' to said crime; the

alleged intent was to thereby bring about the conviction of Plaintiff for the alleged commission of said crimes and to cover for the Defendant-Government officials' involvement in said crimes, in direct violation of the Plaintiff's Constitutional Rights as guaranteed under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. (Amend. Complt., p. 6, 1. 11-p. 7, 1. 5.)

In support of this broad claim, the second cause of action alleges that "Defendant Richard M. Nixon, the President of the United States of America, acting through and by his agents and representatives Defendant Egil Krough, E. Howard Hunt, and G. Gordon Liddy, and others under the guise of domestic security "conspired to commit the 'Ellsburg burglary' ", and in pursuance thereof defendants Hunt and Liddy, utilizing equipment supplied by the Central Intelligence Agency, committed the burglary. (Amend. Complt. p. 5, 1. 21-p. 6, 1. 10.)

He further claims that at a later date he was subsequently arrested and prosecuted for an unrelated burglary by defendant Franklin "and others", that defendant Franklin attempted to get plaintiff to admit to that burglary "and other unspecified burglaries in the Beverly Hills area" which plaintiff denies committing; that defendant Franklin testified against him at the preliminary hearing in that case and his testimony was based largely upon "an unsigned and manufactured confession", resulting in plaintiff's being bound over for trial. As a further result of defendant Franklin's alleged perjury "and conspiring to commit those crimes in consort with the Defendant Bruce Campbell, and others. . . in furtherance of . . . the conspiracy to make the Plaintiff the 'scapegoat' for the (Ellsburg burglary) and to bring about his conviction on (the unrelated burglary), the Plaintiff was convicted of (the unrelated burglary)." (Amend Complt. p. 7, 1. 6-p. 9, 1.6.)

Plaintiff alleges that as further overt acts in furtherance of "the herein complained of conspiracy" defendant Cork publicly accused plaintiff of confessing to the Ellsburg burglary a month after it occurred, stating that it al-

legedly occurred while plaintiff was looking for narcotics; and that David Nissen, "United States Prosecuting Attorney" in *United States v. Russo*, Crim. No. 9373, "in the Pentagon-Papers Trial", introduced into evidence in that case certain evidence relating to plaintiff "while withholding other equally relevant evidence. . . that would have proven that the Plaintiff had not committed the (Ellsburg burglary) . . . with the intent to make it appear that the Plaintiff had actually committed the said criminal offense in order to obstruct justice and have the Plaintiff convicted of the said crime . . . and/or in the alternative cast him in a bad light before the eyes of the public. . . ." (Amend. Complt., p. 9, 1. 7-p. 10, 1. 14.)

It is alleged that as a further act in furtherance of the "conspiracy", "Defendant Richard M. Nixon, President of the United States of America", and "John Ehrlichman, Presidential Advisor/Defendant" invited the presiding judge at the "Pentagon-Papers" trial to the Western White House for the purpose of offering him "the bribe of a position with the Federal Bureau of Investigation as its Director" with the "malicious intent of influening the outcome of the Pentagon Papers Trial" and "securing the conviction of Daniel Ellsburg and Anthony F. Russo" and "substantiating the Plaintiff's alleged involvement in the (Ellsburg burglary)." (Amend. Complt. p. 10, 1. 16-p. 11, 1. 4.)

Lastly it is charged that in furtherance of the alleged conspiracy defendants Cork, Campbell and Franklin falsely testified before the Los Angeles County Grant Jury in June 1973, regarding the "Ellsburg burglary", "in support of their statements and accusations previously made accusing the plaintiff of having confessed to the (Ellsburg burglary)." (Amend. Complt. p. 11, 11. 5-29.)

Plaintiff seeks substantial damages in this action, and demands a jury trial.

It is concluded that the amended complaint is, as to defendant Nixon, for conduct allegedly engaged in by him in his capacity as President of the United States, and that, at least as to this defendant, the amended complaint fails to

state a claim cognizable in a federal court. His entry into the conspiracy alleged was purportedly in the pursuit of "domestic security."

"It is not within the province of the courts to inquire into the policy underlying action taken by the political departments—Congress and the President—in the exercise of their conceded powers." The Consititution of the United States of America, Senate Doc. #39, 88th Congress, 1st Session, p. 524.

The President is "beyond the reach of judicial direction in the exercise of any of his powers, whether constitutional or statutory, political or otherwise," op. cit., at 553-54, citing *State of Mississippi v. Johnson* 71 U.S. 437 (4 Wall 475) (1867) [in which an injunction against enforcement by the President of an Act of Congress was denied.]

See however, *Scheuer v. Rhodes*, U.S. , April 24, 1974, in which the Supreme Court said:

> "Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' *Sterling v. Constantin*, 287 U.S. 378, 397 (1932)."

In a recent unpublished opinion, the Ninth Circuit Court of Appeals said,

> "We do not reach the question whether the district court has power to assert jurisdiction over the President because we agree with the district court that no claim for relief has been or can be stated against the President under the doctrine of executive immunity explicated in *Barr v. Matteo* (1959), 360 U.S. 564 and *Scheuer v. Rhodes* (1974) U.S. . (See also *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (2d Cir. 1972) 456 F.2d 1339.)"

Reese v. Nixon, #72-3070, Memorandum, May 3, 1974, affirming and reversing, in parts, 347 F. Supp. 314 (C.D. Cal. 1972).

On the other hand, by common law principles, a subordinate executive officer is personally liable under the ordinary law for any act done in excess of authority, op. cit., at 555, citing *Little v. Barreme*, 2 Cr. 170 (1804); *United States v. Lee*, 106 U.S. 196 (1882); *Spaulding v. Vilas*, 161 U.S. 483 (1896). The federal district court has jurisdiction to entertain such suits [*Bell v. Hood*, 327 U.S. 678 (1946)], and may now award damages for violations of constitutional rights, in appropriate cases [*Bivens*, supra], unless there is official immunity for the acts complained of. [Cf. *Reese v. Nixon*, 347 F. Supp. 314, 317-18 (C.D. Calif. 1972), affirmed in part and reversed in part, in an unpublished opinion (9th Cir. May 3, 1974).]

Dismissal of the complaint as to the President is therefore appropriate. Holding the President liable for damages for his past official conduct would be as much of an interference with the Executive Branch as would be the enjoining or mandating of future acts.

Granting of the motion to quash the service of process is inappropriate, since there has been no service made upon him. No good cause is shown for striking the name of defendant Nixon from the pleadings, and no authority or argument thereon has been put forward by the moving party. Since defendant Nixon's name is the first to appear, it would cause some confusion in court records to now strike that name from all pleadings. If this matter were to come to trial before a jury, good cause might then exist, and the motion could then be renewed.

IT IS THEREFORE RECOMMENDED that the motion to dismiss the complaint be granted as to defendant Richard M. Nixon, President of the United States of America, and that the motion to quash the service of summons on defendant Nixon and to strike his name from all pleadings be denied, without prejudice.

DATED: May 24, 1974

/s/ _____

RALPH J. GEFFEN
United States Magistrate

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 75-4-T

PETER BOHMER, PAULA THARP, PLAINTIFFS,

v.

RICHARD MILHOUS NIXON, ET AL., DEFENDANTS.

OPINION AND ORDER

Plaintiffs, Peter Bohmer, formerly a professor at San Diego State University, and Paula Tharp, formerly a staff member of the San Diego Street Journal, brought this lawsuit in January 1975. Plaintiffs are self-styled critics of the American form of government, and of the Nixon Administration.

Plaintiffs allege a broad, nationwide conspiracy among present and former federal and local officials, and members of a right-wing paramilitary group known as the Secret Army Organization. Federal officials, who include then President Nixon, are said to have implemented, approved, or condoned various plans and programs, the purpose and effect of which were to suppress dissident activities of such groups as the "New Left" or of persons sharing the views of the plaintiffs. Examples of these programs include "Cointel," the "Huston Plan" the "White House Enemies List," the "Liddy Plan," and so forth. Generally, the acts alleged in furtherance of the conspiracy or conspiracies are local in nature, and encompass the conduct of the F.B.I. the C.I.A., their informants, and numerous agents of the San Diego County Sheriff's Office and the San Diego City Police Department, among others. The acts themselves include: a shooting, telephonic threats, vandalism, fire-bombings, warrantless searches, and a bad faith criminal prosecution which resulted in a felony conviction.

Plaintiffs allege the conspiracy or conspiracies and the overt acts constitute infringements of their civil rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth,

Tenth, and Fourteenth Amendments, as well as under the Civil Rights Acts [42 U.S.C. §§ 1983, 1985, 1986] and the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C. §§ 2510–2520]. As redress for these alleged wrongs plaintiffs seek an injunction, a declaratory judgment and money damages of 5.3 million dollars. From former President Nixon, plaintiffs seek the same relief, although at oral argument they recognized the mootness problems, and therefore concentrated on the money damage aspect of the case against him. This Court proceeds on the assumption money damages is the primary form of relief sought.

Mr. Nixon, through private and government counsel in separate motions, moves to dismiss the claims against him on the ground that the discretionary acts of a Chief Executive present non-justiciable questions over which this Court has no jurisdiction to review. Rather than the traditional grounds of justiciability, Mr. Nixon really urges the contention that he is immune from suit for acts done while President.

I.

To the extent that it is contended, this Court must reject the argument that a President is absolutely immune from judicial relief, whatever the form of that relief, and whatever a President's conduct. *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *cf. United States v. Nixon*, 418 U.S. 683 (1974).

II.

What remains is an argument grounded in concepts of separation of powers to the effect that this Court should not retain jurisdiction over the action against Mr. Nixon under the circumstances presented in this case. The contention is premised on the notion that the judiciary should limit the circumstances in which it will afford judicial relief to a plaintiff in an action against the President. The purpose of judicial self-restraint is to avoid needless constitu-

tional adjudications and direct confrontations between the judicial and executive branches of government.

There are certain plausible policy justifications to support what amounts to a distinction in treatment between a President and any other executive officer. Courts recognize the interests of the nation are generally best served if a President is not required to divert precious time to the defense of his every judgment or decision in a court of law. More importantly, it is desirable to foster a President's independence of thought and judgment, rather than to routinely subject his decisions to judicial scrutiny. *See generally Nixon v. Sirica, supra,* at 750–752 (MacKinnon, J., concurring and dissenting opinion). Implicit in these considerations is the practical recognition that the Chief Executive acts through his agents, and in many circumstances, delegates almost completely the performance of certain duties.

Generally, courts have recognized that the judiciary may give mandamus relief where the executive function is ministerial or perfunctory in the sense that a specific action is commanded by a statute or by the Constitution. *Mississippi v. Johnson,* 71 U.S. (4 Wall) 475 (1867); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). Yet no case has been cited or found in which this relief was actually given against a President. These same cases acknowledge that judgmental or discretionary acts of a President are not reviewable by the judiciary.

Recent Presidential cases have mollified the absoluteness of the latter proposition, recognizing that in certain, limited circumstances the judicial branch must determine directly, the legality of acts of a Chief Executive. *See, e.g., National Treasury Employees Union v. Nixon, supra; Nixon v. Sirica, supra.* In the *National Treasury* case, the Court of Appeals found that the Federal Pay Comparability Act, 5 U.S.C. § 5301 et seq., required the President to perform a ministerial act, the actual performance of which had not been delegated. Because the requirement to act was deemed ministerial, mandamus was held to be the proper remedy. President Nixon contended

he was immune from the lawsuit under the separation of powers doctrine, as he contends here. But the court rejected the contention, concluding that the President was a necessary or indispensable party to the action in the sense that without his presence plaintiffs would be without remedy. Similarly, in *Nixon v. Sirica, supra,* the Court of Appeals affirmed the district court's denial of President Nixon's motion to quash a Grand Jury subpoena for the White House tapes. The court found that since the tapes were in the personal possession of the President, no other party could comply with the subpoena. Both courts expressed reluctance to directly confront or interfere with the Chief Executive, but neither was willing to exalt the generalized policies supporting judicial non-interference in the particular circumstances where a judicial remedy would be denied altogether or where the Grand Jury process would be thwarted.

However, where the same quality of necessity has not been demonstrated, other courts have declined to retain jurisdiction over a President. *See, e.g., Reese v. Nixon,* 347 F.Supp. 314 (C.D. Cal. 1972) rvsd. in part on other grounds No. 72-3070 (9th Cir. May 9, 1974); *Atlee v. Nixon,* 336 F.Supp. 790 (E.D. Penn. 1972); *San Francisco Redevelopment Agency v. Nixon,* 329 F.Supp. 672 (N.D. Cal. 1971); *Suskin v. Nixon,* 304 F.Supp. 71 (N.D. Ill. 1969).

Here, plaintiffs have alleged a conspiracy or a series of conspiracies, in which there are fifty-six other co-conspirators named as defendants, and more are said to exist. Plaintiffs seek compensation for what they characterize as the wrongs done to them by Mr. Nixon while President, but his compensation—judicial relief—can be afforded from any of the other named executive officials who are later found liable. Plaintiffs are entitled to the opportunity to obtain judicial relief, and this will not be precluded. They are not, however, entitled to monetary relief from a former or a sitting President absent a clear showing of his indispensability to the lawsuit. Moreover, the correctness of Mr. Nixon's judgments as President

may be evaluated as a by-product of determining the legal rights of the remaining defendants, as has taken place in other cases. *See, e.g., United States v. United States District Court*, 407 U.S. 297 (1972); *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952); *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975). Finally, this Court deems unpersuasive plaintiff's argument that the policies supporting judicial non-interference with Presidential decisions do not apply in a lawsuit against a former President, as here. If in the first instance one accepts the salutary principles of not giving judicial relief against a sitting President unless some clear showing of necessity is made—which this Court does—then it necessarily follows that plaintiffs should not be allowed to do indirectly what they could not have done directly, where no showing of necessity has been made. This lawsuit could not have been maintained against Mr. Nixon as an incumbent President; thus, no greater right to bring this lawsuits should now accrue to plaintiffs.

III.

For the foregoing reasons, the claims against Mr. Nixon must be dismissed, with prejudice. This Court finds that the ultimate termination of the litigation will not be advanced by the granting of an interlocutory appeal from this ruling; therefore, plaintiffs' request for this relief must be denied.

IT IS SO ORDERED.

DATED: June 16, 1976.

/s/

HOWARD B. TURRENTINE,
United States District Judge

COPY TO:

See attached list

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 69 CR 180

UNITED STATES OF AMERICA

v.

DAVID T. DELLINGER, ET AL., DEFENDANTS

Before Judge Hoffman,
Friday, February 20, 1970,
10:00 o'clock a.m.

Resumed pursuant to adjournment.

Present:
Mr. Foran
Mr. Cubbage
Mr. Schultz
Mr. Epstein
Mr. Connolly
Mr. Kunstler
Mr. Weinglass

THE COURT: After the indictment in this case was returned, but before trial, the defendants moved for an order directing the government to disclose to them any and all logs, records and memoranda of any electronic surveillance directed at any defendant or any unindicted coconspirator, or upon the premises thereof, and for an evidentiary hearing to determine whether any of the evidence upon which the indictment was based or which the government intended to use at the trial was tainted by such surveillance.

In response, the government admitted that the conversations of certain of the defendants had been overheard during the course of electronic surveillance, but contended that such surveillance was not unlawful, and that disclo-

sure of the record of such surveillance was not required. The government disclosed to the defendants records of certain surveillance operations and submitted to the court sealed exhibits containing the records of other surveillance operations containing the records of other surveillance operations for in camera examination by the court, pursuant to an affidavit of the Attorney General of the United States which stated that the disclosure of the latter exhibits would endanger the national security of the United States.

As the record reveals, the court determined, or, rather, decided to defer determination of this matter until after trial. Five of the original eight defendants having been found guilty by the jury under single counts of the indictment, it now is necessary to deal with this matter.

The Supreme Court of the United States has recently held that where electronic surveillance is found to have been unlawful and if a defendant is found to have standing to object to that surveillance, the government must disclose to him the records of overhead conversations which it is not entitled to use in building its case against him. Alderman v. United States, 394 U.S. 165, 180-85, 1969.

Before such disclosure is required, there must be a finding that the surveillance was unlawful and that the defendant has standing to object. Clearly the defendants here have no standing to object to surveillance directed against their co-defendants or against their co-conspirators as expressly held in Alderman, 394 U.S. at 171-76.

It is equally clear, however, that under Alderman each of the convicted defendants has the requisite standing with respect to surveillance in which his own conversations were overheard.

There remains the question of [whether] the surveillance was lawful, since a finding by the court that the surveillance was lawful would make disclosure and further proceedings unnecessary. Giordano v. United States, 394 U.S. 310, 313, 1969.

The determination of the legality of the surveillance can appropriately be made in ex parte in camera proceedings. Giordano v. United States, 394 U.S. at 314. Justice Stewart, concurring. United States v. Battaglia, 410 F.2d 279, 7th Circuit, 1969.

The threshold question, then, is whether the electronic surveillance, during the course of which the conversations of the defendants were overheard, was or was not lawful. The Fourth Amendment to the Constitution of the United States prohibits "unreasonable searches and seizures," and therefore under the exclusionary rule of Weeks vs. United States, 232 U.S. 383, 1914, evidence seized from a defendant in violation of his Fourth Amendment rights may not be used at trial.

Fruits of such unlawful searches are excluded as well. Silverthorne Lumber Company vs. United States, 251 U.S. 385, 1920.

And "because the amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. Silverman vs. United States, 365 U.S. 505, 1961; Katz vs. United States, 389 U.S. 347, 19674.

Moreover, the exclusionary rule applies to violations of Section 605 of the Communications Act of 1934, 47 U.S.C. Section 605, which prohibits the interception and divulgence of telephone conversations without the authorization of the sender. Nardone vs. United States, 302 U.S. 379, 1937. Nardone vs. United States, 308 U.S. 338, 1939.

It is the position of the Government that while the surveillance in question here may not in all instances comply with the broad rules enunciated by the foregoing cases, it should be declared lawful on the ground that there is an exception from the warrant requirements for surveillance authorized by the President or the Attorney General for the purpose of "national security" investigations. An affidavit of the Attorney General submitted to the court with the sealed exhibits states that conversations of the defendant "were overheard by Government agents who were monitoring wiretaps which were being employed to

gather foreign intelligence information, or to gather intelligence information concerning domestic organizations which seek to use force and other unlawful means to attack and subvert the existing structure of the Government.

"The records of the Department of Justice reflect that in each instance the installation of wiretaps involved had been expressly approved by the then Attorney General." The defendants argue that there is no such "national security exception" to the search and seizure rules and that the surveillance carried out by the Government was therefore unlawful. This issue was fully briefed and argued by counsel for the respective parties before trial and I am now prepared to decide it.

The Supreme Court has not addressed itself to the question of whether authorization by other than a magistrate—such as by the President or by the Attorney General—would satisfy the Fourth Amendment in a situation involving national security. The question was specifically reserved in Katz vs. United States, 389 U.S. 347, 358, Note 23.

The issue was also raised though not decided, in United States v. Stone, No. 68 CR 1233, an unreported memorandum of decision, United States District Court for the District of Columbia, September 15, 1969. Mr. Justice White concurring in Katz said:

> " . . . there are circumstances in which it is reasonable to search without a warrant . . . Wire tapping to protect the security of the nation has been authorized by successive Presidents . . . We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized the electronic surveillance as reasonable."

Mr. Justice Douglas, joined by Mr. Justice Brennan, also concurring in Katz, expressed contrary views. 389 U.S. at 359-60.

Thus, aside from the views expressed by three Justices, the question at hand is one of first impression. The pur-

pose of the Fourth Amendment proscription of unreasonable searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasion by government officials, and, except in certain carefully defined classes of cases, a search is "unreasonable" unless it has been authorized by a valid search warrant. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 528-29, 1967.

There are, however, certain situations in which a warrant is not required and in assessing whether the public interest demands creation of a general exception to the Fourth Amendment warrant requirement, the question is whether the authority to search should be evidenced by a warrant. Camara v. Municipal Court, 387 U.S. at 533.

In making that assessment, it is appropriate to bear in mind the purpose that is served by requiring a warrant before a search may be conducted. The function of the warrant requirement for searches is the same as for arrests: to insure that the deliberate impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. Wong Sun v. United States, 371 U.S. 471, 481-82, 1963.

In most criminal investigations, it is both appropriate and feasible for a judicial officer, such as a magistrate, to make an independent determination of whether there is probable cause for a search—or to conduct electronic surveillance. It does not necessarily follow, however, that in all cases this warrant procedure should be required. The gathering of intelligence vital to the preservation of national security, whether deemed necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, or to protect the United States against a clear and present danger to the structure or the existence of its Government, involves considerations of involved factual and policy matters that are uniquely within the competence of the executive branch of the Government. For that reason I agreee with the conclusion reached by Judge Ingraham of the Southern District of

Texas, in the case of the United States vs. Clay, criminal number 67 §94, a memorandum opinion, July 14, 1969, from which I quote:

> ". . . it is the executive, not the judiciary, which alone possesses both the expertise and the factual background to assess the reasonable-practical standpoint, it would be ridiculous to place on a United States Commissioner the burden of deciding what is and is not a threat to national security. The court does not believe the judiciary should question the decision of the executive department that such surveillances are reasonable and necessary to the protection of the national interest."

There have been other cases upon which courts have deferred to the executive in matters, the determination of which is more suitably left to that branch of government. In C&S Airlines, Incorporated vs. Waterman Steamship Corporation, 333 U.S. 103, 111, 1948, the Supreme Court said "The President has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

And the Court said in Coleman vs. Miller, 307 U.S. 433, 455, 1939:

> "There are many illustrations in the field of foreign relations where there are considerations of policy considerations of extreme magnitude and certainly. . . . incompetent to the examination and decision of a court of justice."

See also Dakota Central Telephone Company vs. South Dakota, 250 U.S. 163, 1919.

Thus, because the matter of when electronic surveillance is reasonably necessary to investigations carried out to protect the national security is a matter not suitable for a judicial determination, but is rather best left to the authorization of the President or his chief legal officer, the Attorney General, I conclude that electronic surveillance

in national security cases is not subject to the warrant requirements of the Fourth Amendment.

The remaining question is whether electronic surveillance conducted solely for the purpose of gathering foreign intelligence information, or to gather intelligence information concerning domestic organizations which seek to use force and other unlawful means to attack and subvert the existing structure of the Government, violates Section 605 of the Federal Communications Act.

There, like the Constitutional issue, is an "open question" not yet decided by the Supreme Court. United States vs. Stone, No. 68 CR 1233, District Court of the District of Columbia, an unreported memorandum of decision, September 15, 1969.

In Nardone vs. United States, 302, U.S. 380, 1937, the Court held that wiretap evidence acquired by the Federal officers was inadmissible at a criminal trial under Section 605.

The Government takes the position that Section 605 does not limit the power of the President to authorize wiretapping for the purpose of gathering intelligence information to preserve the national security. The merit of this position is evidence of the fact that nothing in the legislative history of the Federal Communications Act indicates that Congress intended to prohibit electronic surveillance authorized by the Attorney General for such purposes. The Nardone case reflects no awareness of the problem of the need to gather intelligence information and the need to keep those activities secret. In view of the President's primary responsibility for preserving the national security, it would be unreasonable to conclude that either the Congress in enacting Section 605 or the Supreme Court in deciding Nardone, obtain information vital to the fulfillment of his responsibilities. This interpretation of Congressional intent is borne out by the recently-enacted Omnibus Crime Control and Safe Streets Act of 1968, which specifically exempts from its own restrictions and those of the Federal Communications Act and wiretapping authorized pursuant to the Constitutional

power of the President to "protect the nation against actual or potential attack or other hostile acts of a foreign power to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security against foreign intelligence activities, and to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."

I have carefully examined the surveillance records and the authorization memoranda contained in the sealed exhibits submitted by the Government to the court in camera and I find that the electronic surveillance that was conducted was expressly authorized by the Attorney General for the purpose of gathering intelligence information.

For the reasons I have just set forth, I therefore conclude that the surveillance was lawful and consequently not subject to the disclosure requirements of Alderman vs. United States.

Mr. Clerk, the motion of the defendants for disclosure of electronic surveillance records and for hearing to determine whether their conviction was tainted by such surveillance will be denied.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. KC-CR-1204

UNITED STATES OF AMERICA, PLAINTIFF,

v.

FELIX LINDSEY O'NEAL a/k/a PETE O'NEAL, DEFENDANT.

TRANSCRIPT OF PROCEEDINGS

Appearances:

HON. ARTHUR J. STANLEY, JR.,
Chief Judge, Presiding.

For the Plaintiff:

MR. ROBERT ROTH,
United States Attorney,
Kansas City, Kansas.

MR. JAMES A. FUSATERI,
Assistant U.S. Attorney,
Kansas City, Kansas.

For the Defendant:

MR. AUSTIN F. SHUTE,
845 Law Building,
Kansas City, Missouri.

MR. MICHAEL LERNER,
747 Ann Avenue,
Kansas City, Kansas.

Harold Pittell,
Official Reporter.

BE IT REMEMBERED, on the 1st, 2nd and 3rd days of September, 1970, the above matter coming on for hearing before the Honorable Arthur J. Stanley, Jr., Chief Judge of the United States District Court for the District of Kansas.

MORNING SESSION, TUESDAY, SEPTEMBER 1, 1970

(Whereupon, the following proceedings were had OUT OF THE PRESENCE AND HEARING OF THE JURY PANEL:)

THE COURT: We will be on the record in Case No. KC-CR-1204, United States, vs. Felix Lindsey O'Neal. I understand that counsel had some matter to take up with the Court and I want to take this opportunity, first, because this might be of some significance to counsel in the voir-dire examination, the defendant's motion to require the government to elect between Counts 1 and 3 will be denied since the evidence required to establish the one count, the charge in the one count, would differ from that to be charged in the other.

I have examined in camera the logs of the telephone, intercepted telephone conversations, and I find that all of the interceptions were after the effective date of the Crime Control Act and all were after the date of January 16, 1969, the date the offense is alleged to have been committed and that none of them have any significance with respect to the offenses charged in the three counts in this case and that all were authorized by the President acting through the Attorney General. The case of Alderman versus United States, 394 U.S. 165, has to do with disclosure to the defense of intercepted communications illegally obtained and I hold here and rule that all of the interceptions, the wire taps, in this case, those logs of which were submitted to the Court for in-camera examination, were legally obtained within the inherent constitutional powers of the President because of his responsibility to gather intelligence information having to do with matters vital to national security and in connection with that, I cite the case of United States versus Clay, Fifth Circuit, not yet published, so far as I know, an opinion handed down July 6, 1970, and United States versus O'Baugh, a decision of the District Court of the District of Columbia, I think not published, case in that court numbered CR-1529-67, the decision being dated September 30, 1969. So the logs of the interceptions will be sealed by the Court and re-

turned to the Attorney General where in the words of Attorney General Mitchell's affidavit, they will be retained under seal so they may be submitted to any appellate court that may review this matter.

Now, if you will forgive me for taking up my matters before I ask you what it was that you wished to take up with the Court, I would ask the defense at whatever time you feel appropriate, Mr. Shute, to assist me in preparation of the instructions, to advise me whether you claim that any of the exceptions under Section 922(a)3 are applicable here, that is, [151] whether you will contend that the defendant is a licensed importer, dealer, et cetera, whether he obtained the gun charged, if he did obtain it, as a bequest or through intestate succession or whether the purchase was authorized under Missouri law or whether it was loaned, the weapon was loaned, or rented for lawful sporting purposes or whether it was lost—whether he had lost a gun in Kansas while engaged in a match or in hunting activities.

MR. SHUTE: Yes, yes.

THE COURT: As I understand, I believe this to be the rule, in this circuit at least, the burden is on the defendant to bring himself within any exception in the statute. If there is any such exception urged, I'll have to prepare to instruct on it.

MR. SHUTE: Are you asking me for that now, Your Honor?

THE COURT: Now or whenever you feel that it is appropriate to tell me. I'll be working on the instructions probably nights.

MR. SHUTE: The only possible exception, Your Honor, would be such a purchase in the State of Missouri would be lawful.

THE COURT: Do you have—

MR. SHUTE: I frankly have tried to see

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

Criminal No. 58942-71

UNITED STATES

v.

BRADFORD J. LYTTLE

MEMORANDUM OPINION

After the indictment[1] in this case was returned, but before trial, the defendant moved, *inter alia*, for an order directing the government to disclose to him any and all logs, records and memoranda of any electronic surveillance directed at the defendant, and for a pre-trial evidentiary hearing to determine whether any of the evidence upon which the indictment was based or which the government intended to use at the trial was obtained by such surveillance.[2]

In response, the government admitted that certain conversations of the defendant had been overhead during the course of electronic surveillance, but contended that such surveillance was not unlawful, and that disclosure of the records of such surveillance was, therefore, not required. The government admitted, for this Court's *in camera* examination, a sealed exhibit containing the records of the surveillance. I have examined that *in camera* exhibit. In an affidavit of the Attorney General of the United States, accompanying the exhibit, he stated that:

> "Said electronic surveillances were authorized by the President of the United States, acting through the

[1] Defendant has been charged with violating Title 22 of the Code of the District of Columbia, § 505(a), 505(b) and 502.

[2] In his Motion, defendant also requested a number of other orders. *Eg.*, an order dismissing the indictment and an order suppressing illegally obtained evidence. For reasons to be stated, it is unnecessary to recount in full here all of the relief requested by the defendant in his motion.

> Attorney General, in the exercise of his authority relating to the national security as set forth in 13 U.S.C. §2511(3). My authorizations for such surveillances were in response to the requests of the Director of the Federal Bureau of Investigation, which requests were considered in conjunction with all of the foreign and domestic intelligence available to the Executive Branch of the Government.
>
> I certify that it would be a practicable impossibility to submit to the court all of the facts, circumstances, and other considerations upon which each authorization was based. I further certify that it would prejudice the national interest to disclose the particular facts contained in the sealed exhibit and concerning the surveillances other than to the court, *in camera*."

The issue to be decided is whether or not the surveillance was lawful. Having considered the sealed exhibit, the affidavit of the Attorney General, and the arguments of counsel, this Court finds for the following reasons that the surveillance was lawful,[1] and, that, accordingly, disclosure to the defendant is not required. *Giordano* v *United States*, 394 U.S. 310, 313 (1969).

In a recent decision, the Supreme Court specifically reserved the very question I decide today:

> "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case. *Katz* v *United States*, 389 U.S. 347, 358, n.23 (1967)."

After considering this question, the Court is compelled to agree with Mr. Justice White that:

> "We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, nor considered the recruitments of national

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[1]The determination of the legality of the surveillance can appropriately be made in *in camera* proceedings. *Giordano v. United States*, 394 U.S. 310, 314. (Justice Stewart, concurring.) see also *United States* v *Battaglia*, 420 F.2d 279 (7th Cir., 1969), and *Taglianetti* v *United States*, 394 U.S. 316, 317.

security and authorized electronic surveillance as reasonable." (389 U.S. at 364). (Concurring opinion).

The Supreme Court has held that electronic surveillance is a search and subject to the requirements of the Fourth Amendment, which provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The first question, then, to be resolved is whether or not the Fourth Amendment requires a warrant in all circumstances. The Supreme Court has recognized several situations where the warrant requirements may be dispensed with. *McDonald* v *United States*, 335 U.S. 451 (1948); *Brinegar* v *United States*, 338 U.S. 160 (1949); *Carroll* v *United States*, 267 U.S. 132 (1925); *Cooper* v *California*, 386 U.S. 58 (1967); *Warden* v *Hayden*, 387 U.S. 294 (1967); *Terry* v *Ohio*, 392 U.S. 1 (1968); *Colonnade Catering Corp.* v *United States*, 397 U.S. 72 (1970); *Chambers* v *Maroney*, 399 U.S. 42 (1970).

> ". . . what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures . . .,"

Elkins v *United States*, 364 U.S. 206, 222 (1960), and a reasonable and lawful search is one where it would be unreasonable to require a warrant.

The President and the Attorney General, as his agent, are in a unique position to assess the needs of the national security. They have acccess to a wide range of classified and sensitive information. They are constantly called upon to analyze that information and to render difficult decisions on the course of action to take. It seems unreasonable to the Court to require the Executive to risk the compromise of sensitive information and to submit decisions affecting the national security to individuals whose

experience is remote from this field.[1] Such a procedure can only serve to frustrate the Executive's ability to protect the national security. In situations such as this, the protection of individual rights afforded by the judicial warrant must defer to the need to protect the national security. cf., *Camara* v. *Municipal Court*, 387 U.S. 523, 533-537 (1967).

The practice involved here—the conduct of intelligence-gathering electronic surveillance in national security situations—has been engaged in for at least 30 years by successive Presidents. In the Omnibus Crime Control and Safe Streets Act of 1968, Congress recognized this practice and specifically exempted it from the statutory procedures for obtaining a warrant for electronic surveillance, in 18 U.S.C. 2511(3). As the Supreme Court recognized in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 77 (1979):

> ". . . Congress has broad authority to fashion standards of reasonableness for searches and seizures."

Both Congress and the Executive have concluded that a warrant is not required in this area, and this Court is compelled to agree.

For all of the foregoing reasons, this Court is of the opinion that the surveillances involved in this case are lawful. Accordingly, defendant's Motion for disclosure, suppression of evidence, and dismissal of the indictment is denied.

s/ S. THOMPSON
JUDGE
1/12/72

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[1] The Court agrees with the conclusion reached by Judge Ingraham of the Southern District of Texas, in the case of the *United States* v *Clay*, Criminal No. 67 H 94, memorandum opinion, July 14, 1969:

" . . . It is the executive, not the judiciary, which alone possesses both the expertise and the factual background to assess the reasonableness of such a surveillance. From a purely practical standpoint, it would be ridiculous to place on a United States Commissioner the burden of deciding what is and is not a threat to national security. The Court does not believe the judiciary should question the decision of the executive department that such surveillances are reasonable and necessary to the protection of the national interest.

DEPARTMENT OF JUSTICE

REMARKS OF ATTORNEY GENERAL JOHN N. MITCHELL BEFORE THE KENTUCKY STATE BAR ASSOCIATION

Cincinnati, Ohio
April 23, 1971

Tonight I want to discuss two fundamental American rights: The individual's right of privacy and the people's right to preserve their form of Government.

Americans cherish their right of privacy, and they react strongly when they think it is threatened. At the outset, therefore, I want to speak candidly about recent efforts to frighten Americans into the conviction that their privacy is in jeopardy from an agency of their own Government. Specifically I refer to charges by a certain Senator and a certain Congressman against the Federal Bureau of Investigation and J. Edgar Hoover.

Let me set the record straight here and now.

Charge No. One: On April 14 the Senator made a lengthy speech claiming that the FBI makes "general political surveillance" of members of the Senate. He based this startling conclusion on the fact that FBI representatives had attended an Earth Day Rally last year where the Senator had been one of the speakers.

The FBI does *not* conduct general political surveillance of Senators, Congressmen or any one else. The reason the FBI attended the rally had nothing to do with the Senator. They were there only to observe certain persons whose known records indicated the possibility of violent or unlawful conduct. Indeed, one such person—who shared the speakers' platform with the Senator—was out on bail at the time under Federal conviction for inciting to riot. Let me ask you: If the FBI trailed a suspect to a ball game of

the Cincinnati Reds, would Johnnie Bench have reason to think he was under surveillance?

The plain fact is that the Senator was not under surveillance and he knew he was not under surveillance. Yet he twisted the facts to make a political headline, and he owes an apology and a retraction to the FBI and Mr. Hoover.

Charge No. Two: On April 5 the Congressman stated flatly and unequivocally that the FBI "taps telephones of members of this body and members of the Senate"—and he later said he had "proof positive" to support his charges.

He even had the audacity to compare the FBI to Hitler's Gestapo.

His unproven charges were widely circulated, and he was repeatedly challenged by his colleagues and others to produce proof. Day after day he refused to do so. Yesterday he finally took the floor of the House and made a lengthy speech. It was full of adjectives, but not one iota of proof of the reckless charges he had made. Instead, it turned out that he thought he heard interference on his phone at home and suspected it was being tapped. He had it checked by the telephone company, which reported to him that his phone had not been tapped. The Congressman stated that the phone company always denies a tap that has been made by the FBI, so he said this proved his point. When "no" means "yes," I am reminded of the type of hypochondriac who insists he is sick, regardless of the doctor's assurances. The Congressman has been afflicted by a new type of paranoia—called *Tapa*noia—the belief that your telephone is being tapped.

I repeat what I said at the time: The FBI has not tapped the telephone of any member of the House or Senate—now or in the past. And the Congressman also owes a full retraction and apology to Mr. Hoover and the FBI.

I do not want to mislead you into thinking there have been no investigations of Congressmen. Where there is probable cause to believe a Federal crime has been committed, the FBI has a duty to obtain evidence. I am happy

to add that with two or three possible exceptions, members of Congress agree that they are entitled to no special immunity from the normal process of law. On rare occasions over the years, a member of Congress has indeed been the subject of normal investigative procedures—but not wiretapping—when the evidence indicated that such procedures were appropriate and necessary.

But with regard to the charges of general surveillance and wiretapping of Congressmen, those who are trying so hard to discredit the FBI for their own political purposes can't come through with the facts. All they have come up with is confirmation that the FBI is carrying out its statutory duties in the manner that the American people would want them carried out.

Now let us move from the realm of fantasy to the real world of fact. As you know, the whole question of electronic surveillance has been evolving in the courts for many years. In the *Katz* decision of 1967, the Supreme Court held for the first time that the Fourth Amendment protects private conversations as well as private premises from "unreasonable searches and seizures." It also held that a prior court order is necessary for electronic surveillance. But it left open the question of whether such a court order is necessary in a situation involving the national security.

Taking this cue, Congress enacted some careful wiretapping legislation in 1968. Wiretapping by private parties was outlawed, but Government wiretapping was authorized in cases of specified serious crimes. Such wiretapping is strictly regulated by the need to get a court order from a judge after showing probable cause for a belief that a crime has been or would be committed. The detailed requirements of the law actually provide more protection of privacy rights than does the warrant procedure that has long been established for physical searches and seizures.

Thus I cannot conceive how court-authorized wiretapping as such can continue to be a public issue, any more than making a search or seizure with a warrant. The prin-

ciple has been set forth by the Supreme Court and the procedures have been spelled out by Congress.

I might add that its use has proven extremely effective in getting evidence that would otherwise be impossible against organized criminals. From January 1969 to March 1971, 315 Federal court-authorized wiretaps—including 51 extensions—were executed. All but 12 produced incriminating evidence. As a result, over 900 persons were arrested and so far, 100 of them were convicted. Additional convictions will undoubtedly result as other defendants among those arrested are brought to trial.

Far from being a source of public fear, as some would have us believe, court-authorized wiretapping provides added protection to the public against organized crime. Used with careful legal limitations, as it has been under the 1968 law, it is a positive benefit to the community.

Let me turn now to the other type of wiretapping that was also covered in the 1968 Act. Congress specifically excepted from the court order requirement the President's need to obtain information to protect the nation against foreign attack or against, and I quote, "the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government." This was also in conformity with Justice Byron White's concurring opinion in the *Katz* case, in which he wrote:

"We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable."

The fact is that such wiretapping had been used at least since 1940, when President Franklin D. Roosevelt called attention to the danger of "Fifth Columns" and authorized the Attorney General to use "listening devices" against "persons suspected of subversive activities against the Government of the United States, including suspected spies." He added, "You are requested furthermore to limit

these investigations so conducted to a minimum and to limit them *insofar as possible* to aliens."

Let me point out that national security wiretapping without a court order has been used by every subsequent Administration. Congress agreed in its 1968 law, believing that such wiretapping was outside the traditional type of judicial decision involving probable cause for a warrant. National security wiretapping is an executive decision, requiring a variety of national considerations other than judicial ones.

Since this 1968 legislation, the wiretap issue has continued to unfold in the courts. A distinction has been manufactured between so-called "foreign national security wiretapping" and so called "domestic national security wiretapping." Two Federal district courts have ruled that the "domestic" variety is unconstitutional without a court order. Two other district courts have ruled that such wiretapping *is* constitutional without a court order. The Sixth Circuit Court of Appeals, sitting here in Cincinnati, has upheld the contention of one of the district courts that so-called "domestic national security wiretapping" requires a court order.

I have made these brief historical references to make it clear that national security wiretapping is not a sudden invention of this Administration. What *is* new is the contention that national security wiretapping should be separated into "foreign" and "domestic," and that the latter should require a court order.

This raises a number of questions, which I would like to discuss.

Question: Is a court order appropriate for *any* national security wiretaps?

Answer: As you know, a court order is required to execute a wiretap in the prosecution of a criminal offense. In order to obtain such a court order, considerable evidence must already have been gained to show "probable cause."

Time is not of the essence in gathering such prior evidence.

But in a case where the national security is threatened, prevention is the first consideration. We first need intelligence on the movements of suspected conspirators, not formal evidence on which to convict them. In order for a national security wiretap to do any good it should come near the beginning of the investigation. Yet at that time we may not have enough evidence to show probable cause for a court order to wiretap. In fact, if we had such evidence we could probably prevent the threat in question without needing a wiretap.

I hope I have said enough to show that the requirement for a court order *is* appropriately applied to orthodox criminal-type wiretaps, but it does not fit the situation when applied to the national security field. By the time enough evidence is obtained to show probable cause, it may well be too late.

Question: Does a national security wiretap without court order conflict with the individual's right of privacy, and must it give way before that right?

Answer: Privacy is a precious right, but it is never absolute to the exclusion of other rights. The Fourth Amendment, which protects privacy, does not prohibit all searches and seizures. It prohibits only *unreasonable* searches and seizures. This contrasts to the unqualified guarantees in the First, Fifth, and Sixth Amendments. In fact, the courts have even indicated that the right of free speech set forth so clearly in the First Amendment must be weighed against other individual rights in such areas as slander, libel, plagiarism, copyright, and the right of privacy itself.

On the other hand, what about another right—the right of the public to protect itself and to preserve the government it has created? *This* right is implicit in the Constitution's very existence, and in the political theory on which it is based. I refer to the social contract by which man voluntarily gives up a degree of jungle liberty to a gov-

ernment of his own making, which in turn protects his liberties against jungle attack by others.

Preserving such a government is most certainly a right of the people who constituted it. As Abraham Lincoln said in his First Inaugural Address, "It is safe to assert that no government proper ever had a provision in its organic law for its own termination." And as I would add, the United States Constitution does not end with the words, "This document will self-destruct."

My point is that the issue of privacy must be considered in this dual context; where these two rights appear to conflict, then we must do what we can to preserve both as fully as possible. But neither commands our total allegiance while the other is dismissed out of hand.

Question: Does the tapping of telephone lines constitute a reasonable exercise of the Government's right of self-preservation?

Answer: It is not only reasonable in this context, but the proper authorities would be derelict if they did not use it. Where there is reason to believe persons are planning a violent attack on the existing structure of the Government, that Government is justified in finding out about those plans. It would be little comfort, after the Government had been overthrown by force, to say, "Well, we didn't feel we should eavesdrop."

Question: What about something less than the threat of actual overthrow? The bombing of the Capitol building? The assassination of a President? If we *could* prevent such monstrous acts through wiretap knowledge, do we have the constitutional right? In such cases should the Government's right to defend itself against violent attack prevail over the individual's right of privacy?

Answer: It must prevail, unless we wish to allow our orderly representative government to be disrupted. Liberty no less than security is endangered when government is prevented from governing.

Question: Should we distinguish between "foreign" national security wiretapping and "domestic" national security wiretapping?

Answer: How do we distinguish "domestic" and "foreign" enemies of our governmental structure? If they are aliens who are working on their own and are not connected with the government of another country, is their threat foreign? If they are American citizens directed by a foreign power, is the threat domestic? And while we are trying to find out which is which, may we tap a wire, or do we have to wait and search the rubble to find out?

If the institutions of our government have been destroyed, does it help to be able to say, "they have been destroyed from within?"

If these case seems too remote, let us look again at an occurrence that has been all too real. I refer to Presidential assassination, which certainly would fall under the classification of "a clear and present danger to the structure or existence of the Government." Since the Civil War four Presidents—Lincoln, Garfield, McKinley, and Kennedy—have been assassinated. Unsuccessful attempts were made on the life of one President-elect, Franklin D. Roosevelt, and one President, Harry Truman. None of these six deeds was done at the direction of a foreign power; I believe those who would make a distinction between foreign and domestic subversion would classify them as "domestic." At least two of them—the cases of Lincoln and Truman—were conspiracies. The question is, if it would have been possible to uncover these conspiracies and prevent them through wiretapping, should the Government have done so?

I would answer this with another question: Are we to stand by and let the plot unfold, so we can say, "Yes, it was a true-blue American bullet?"

Ladies and gentlemen, national security is indivisible. You cannot separate foreign from domestic threats to the Government and say that we should meet one less decisively than the other. I don't see how we can separate the two, but if it were possible, I would say that experience has shown greater danger from the so-called domestic variety. Either we have a constitutional government that can defend itself against illegal attack, or in the last analysis

we have anarchy. The issue was eloquently expressed by Abraham Lincoln in his special message to Congress after the Civil War had begun.

"And this issue," he said, "embraces more than the fate of these United States. It presents to the whole family of man the question whether a constitutional republic or democracy—a government of the people by the same people—can or cannot maintain its territorial integrity against its own domestic foes . . . It forces us to ask: Is there in all republics this inherent and fatal weakness? Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?"

This crucial question has resounded for more than a century since Lincoln. Obviously, we are still grappling with it today. Just as obviously, the answer lies in pursuing a fine balance between individual liberty on the one hand and collective survival on the other. So far we have maintained this balance as we have developed a sound body of constitutional law. But if we ever choose unbridled liberty over government itself, we will soon have neither.

DEPARTMENT OF JUSTICE

"WIRETAPPING AND OUR NATIONAL SECURITY"

AN ADDRESS OF
JOHN N. MITCHEL
ATTORNEY GENERAL

BEFORE THE
VIRGINIA STATE BAR ASSOCIATION
Roanoke, Virginia
June 11, 1971

You have all, I am sure, heard and read a great deal in the last few months about one of the most controversial legal issues of present times—that of national security wiretapping without a warrant. Because it involves the right to privacy, which all Americans cherish rightly, and which this Government is dedicated to protect, the subject is fraught with deep emotional overtones.

The controversy has raged, both in the courts and in the press, and will continue to do so until the Supreme Court speaks to the issue. I would like to explore this issue with you, in hopes of dispelling some of the misconceptions that have arisen.

At the outset, let us consider the stakes involved in the Government's use of electronic surveillance in national security cases. Our success in counteracting hostile intelligence forces and domestic revolutionary elements depends on our ability to learn what they are doing. A key factor in accomplishing this has been the selective use of wiretapping.

The value of wiretapping in combatting foreign-directed espionage and subversion is widely recognized; it has been an integral part of the counter intelligence program of every major country.

The threat to our society from so-called "domestic" subversion is as serious as any threat from abroad. Never in our history has this country been confronted with so many revolutionary elements determined to destroy by force the Government and the society it stands for. These "domestic" forces are idealogically and in many instances directly connected with foreign interests.

In a speech on electronic surveillance Lewis F. Powell, Jr.—one of the nation's most distinguished attorneys and a former president of the American Bar Association—had this to say:

> The distinction between external and internal threats to the security of our country is far less meaningful now that radical organizations openly advocate violence. Freedom can be as irrevocably lost from revolution as from foreign attack.

In recent times, this nation has witnessed ever-increasing numbers of acts of sabotage. In August 1970, a bomb exploded in Sterling Hall at the Madison campus of the University of Wisconsin, killing one individual and causing damages estimated at three million dollars. The wave of terrorist bombings reached a climax with the brazen bombing of the U.S. Capitol early this year. These are not isolated incidents. According to statistics of the National Bomb Data Center, in the ten-month period from July 1, 1970 to May 1, 1971, there were 1,378 bombings in this country—the vast majority of which were related to sabotage of the Nation's military efforts. In these bombings, 106 people were injured and 14 people were killed.

The selective use of wiretapping has been a vital part of the United States Government's defense against subversion for the last three decades. It has led to identification of hostile intelligence officers and their contacts and agents in the United States, disclosure of potential or actual defectors among U.S. nationals, detailed information concerning the *modus operandi* and intelligence methods of hostile agents, and exposure of connections between "domestic" subversive groups and foreign interests.

The argument for national security wiretapping does not rest in necessity alone; it has a very firm legal basis. It is the legal basis that I would like to emphasize in my remarks today.

In this Nation, the Government is constituted by the people and charged with the responsibility, in the words of the Preamble to the Constitution: "to insure the domestic Tranquility, promote the general Welfare, and secure the Blessings of Liberty." Overthrow of this Government by force and violence would be utterly inconsistent with the peaceful means for change provided by the Framers, and would deny to each citizen these securities to which he is entitled.

The Constitution designated the President as the Chief Executive and obligates him to "preserve, protect, and defend the Constitution of the United States." When the President enters upon his office, Article II, Secion 1 of the Constitution requires him to solemnly swear that he will fulfill this obligation. This oath obviously does not refer to the defense of a piece of paper, but to the defense of the actual operation of the Constitution in prescribing the guidelines of Government. Were the President to permit the overthrow of that Government by unconstitutional means, he would be violating his constitutional oath. Nor does the President's oath differentiate between foreign and domestic enemies, requiring him to protect the Constitution against one but not against the other.

The Constitution of the United States cannot possibly be construed as containing provisions inconsistent with its own survival. It is the charter for a viable governmental system—not a suicide pact. Thus, a Presidential decision as to the steps to take in averting a clear and present danger to the national security cannot and should not wait until actual attack, sabotage, or insurrection have occurred.

Accordingly, the President has an obligation to collect, in advance and on a continuing basis, whatever information is reasonable and necessary for present and future decisions in using the forces at his command. No less can be

expected of him if he is faithfully and dutifully to exercise his constitutionally imposed responsibility to protect the national security.

Persons intent on using illegal means to change or alter our form of Government do so covertly, and information as to their activities often can be obtained only in a covert fashion. Wiretapping was proven to be an effective method for obtaining such information.

The wiretapping question has been evolving in the courts for many years, and has been presented in various forms. Generally, these cases can be reduced to two prototypes: (1) wiretapping to attain evidence in the enforcement of penal statutes, and (2) wiretapping to provide necessary intelligence information on a continuing basis to assist the President in discharging his duty to assure and preserve our national security.

In its landmark decision in *Katz* v. *United States*, rendered in 1967, the Supreme Court held for the first time that a wiretap initiated for prosecutive purposes in a criminal case constituted a search and seizure within the meaning of the Fourth Amendment. The Fourth Amendment does not proscribe all searches and seizures, but only those which are found to be unreasonable. Consequently, if it meets this test of reasonableness, wiretapping is a permissible governmental tool.

The Department of Justice has recognized that, when prosecutive information in a criminal case is sought, electronic surveillance—like most searches and seizures—requires a prior judicial warrant. In the litigation currently evolving in the courts, the Government has taken the position that the reasonableness standard of the Fourth Amendment is a flexible one and does not require in all cases that a warrant be obtained. It is our position that compelling considerations exist when the President, acting through the Attorney general, has determined that a particular surveillance is necessary to protect the national security and that under these circumstances the warrant requirement does not apply.

It should be recognized that the Supreme Court has repeatedly held that under exceptional circumstances searches are reasonable though no warrant has been obtained. We believe that national security surveillance is of an exceptional nature and falls within this limited category. Pertinent here is the Court's explicit recognition in another case that "in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration." The Supreme Court has never passed on the question whether "national security" surveillance is reasonable when conducted without a warrant, but Justice White, concurring in *Katz*, has written:

> We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

The Congress has recognized that national security cases involve such compelling considerations. In response to the *Katz* decision, Congress enacted detailed wiretapping legislation in the Omnibus Crime Control, and Safe Streets Act of 1968. In that legislation, the Congress specifically set forth the standards that govern the granting of warrants for electronic surveillance in criminal cases. The Congress, however, carefully avoided imposing the warrant requirement in national security cases by including a provision in the statute which explicitly recognizes the President's authority to conduct such suveillances.

It is our position, given the long-standing practice of the Executive and the Congressional recognition of the necessity for distinguishing between wiretapping in ordinary criminal cases and in national security cases, that warrantless national security surveillances are reasonable within the meaning of the Fourth Amendment.

We have not argued against the need to get authorization for such a wiretap. Instead, we maintain that in national security cases the authorization required by the

Constitution is that of the President of the United States, acting through his Attorney General, rather than that of a local magistrate.

It is not claimed that the President is exempt from the provisions of the Fourth Amendment, or that his discretion is unbridled. For any abuses of the power, the President is answerable not only to the electorate from whom all his powers are ultimately derived, but his decisions may also be reviewed by the courts in appropriate *in camera* proceedings. We simply say that the President's authorization of electronic surveillance for gathering intelligence in national security cases meets the requirement of reasonableness in the Fourth Amendment.

There are sound reasons for confining the authority to order electronic surveillance in national security cases to the President rather than to multitude of lower court judges. The nature of the sensitive information involved in national security cases is not susceptible to evaluation by persons untrained in national security matters or to wide dissemination to persons not authorized by law to receive such information. Only the President is in a position to evaluate adequately such information in the light of various intelligence data submitted by the independent agencies within the intelligence community. We submit that the President, by virture of his office and sources of information, is in a far better position than any magistrate to determine the need to initiate surveillance where the national security is at stake.

But if the authority to issue a warrant in national security cases is to be vested in magistrates only, the United States is left essentially with two options:

(1) To make disclosure to any one or more of over 600 members of the Federal judiciary who in most instances cannot be expected to have the necessary background to analyze the significance of the information disclosed or the necessity for the intelligence sought, or

(2) To become the only nation in the world unable to engage effectively in a wide area of counter-intelligence activities necessary to the national security.

These alternatives do not adequately protect the interests of privacy or of the security of citizens of the United States. Neither alternative, we submit, is acceptable and the Constitution does not require that we accept them.

It has been argued that the President might abuse his power to authorize national security wiretapping. This is put forward to challenge the "reasonableness" of a Presidential authorization, under the Fourth Amendment, and to insist that such authorization be made by the judiciary. Yet the courts that have questioned the constitutionality of the Presidential authorization on this ground are showing a remarkable inconsistency, which I will explain.

In 1805 the U.S. Supreme Court asserted its power to declare an act of Congress unconstitutional in the case of *Marbury* v. *Madison*. Chief Justice John Marshall emphasized that a Federal judge is required by his oath of office to discharge his duties "agreeably to the Constitution and laws of the United States." How could he do this, Marshall asked, if the Constitution "is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime."

In challenging the President's power to authorize national security wiretapping, the Sixth Circuit Court of Appeals reasserted the power of the court to make such judgments of constitutionality, drawing heavily on the *Marbury* v. *Madison* opinion. Yet the very argument of the courts' obligations under oath made in *Marbury* v. *Madison* must apply as well to the President's obligations under *his* oath—the more so since his oath is prescribed in specific words in the Constitution, while the judiciary's oath is not. The President's oath obligate him to "preserve, protect, and defend" the Constitution and the U.S. Government. To deny the President the means of obtaining intelligence on which to base actions in defense of that Government would be to deny him powers essential to the discharge of his oath. If this is the real state of things, to borrow Marshall's words, "this is worse than solemn moc-

kery. To prescribe, or to take this oath, becomes equally a crime."

Since electronic surveillance is an effective means of gathering intelligence in national security cases, and is used by all major countries for such pruposes, the President would be derelict if he did not use it where necessary and appropriate in defense of the constitutional Government.

Thus to claim that the President might abuse this power is the same as claiming that there should be no office with such power—an obviously self-defeating proposition. It is the same as arguing that the courts might abuse the power of constitutional review that Chief Justice Marshall found implicit in *his* oath. Such an argument was effectively answered not only in Marshall's *Marbury* v. *Madison* opinion, but also a number of years earlier by Alexander Hamilton, who wrote that "if it prove anything, would prove that there ought to be no judges."

Are we, then, to trust the courts to fulfill their oath of office without abusing it, but not trust the President in fulfilling his oath? Clearly the hard questions of government must be decided by someone. To withhold such basic powers from the President on the ground that they might be abused is to argue, in a paraphrase of Hamilton's words, "that there ought to be no President."

Finally, the distinction to which I alluded earlier—that between wiretapping in criminal cases and wiretapping in national security situations—is not the one that some lower Federal courts have today chosen to draw. Rather, they attempt to justify a distinction between so-called "foreign" national security wiretapping and so-called "domestic" national security wiretapping.

The use of the terms "foreign" and "domestic intelligence" and "foreign" and "domestic organizations" has resulted in a great deal of confusion and has created a dichotomy, which cannot be supported in law or fact. There is no dividing line between hostile foreign forces seeking to undermine our internal security and hostile "domestic groups" seeking the overthrow of our Govern-

ment by any means necessary. I don't see how we can separate the two, but if it were possible, I would say that history has shown greater danger from the domestic variety.

As a legal proposition, what difference is there between the threat posed to the security of the United States by those who act as agents of a foreign power and that posed by an allegedly "domestic" organization? The Constitution requires the President to swear that he will "preserve, protect, and defend the Constitution of the United States." It does *not* say that he will "preserve, protect, and defend" it only against foreign agents, and that he must permit all others to destroy it if they will. It makes no distinction in its charge of responsibility to the President, and he can make none in his sworn oath to carry out that charge. You cannot separate foreign from domestic threats to the Government and say that we should meet the less decisively than the other. Either we have a constitutional Government that can defend itself against illegal attack, or in the last analysis we have anarchy. I firmly believe that the Constitution does not contain the seeds of its own destruction. Rather, it provides an enlightened basis by which man can prove that he can maintain both his freedom and his Government.

UNITED STATES GOVERNMENT
DEPARTMENT OF JUSTICE

MEMORANDUM

Date: May 6, 1969

TO: Director
Federal Bureau of Investigation

FROM: The Attorney General

SUBJECT: OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

This is in reference to your memorandum to Attorney General Clark of July 2, 1968, captioned as above, in which you posed a number of questions regarding the effect of the electronic surveillance provisions of the Omnibus Crime Control Act upon the operations of your Bureau in the security field.

Insofar as national security cases are concerned, the Act treats with two procedures by which wire and oral communications may be legally intercepted. The first, as set forth in Section 2511(3), recognizes the constitutional power of the President to authorize interceptions in certain specified instances involving the security of the nation. This section does not grant new or additional authority to the Attorney General. The second procedure, outlined in Section 2516, *et seq.*, provides that interceptions may be made in certain specifically designated cases, when authorized and supervised by a Federal judge.

It is our view that the only practical procedure for authorizing electronic eavesdropping for intelligence purposes in most national security cases is that which is described in the Presidential authorization provision. Although in the court order procedure, the Act provides a means for safeguarding from public disclosure, prior to prosecution, the existence of an electronic eavesdropping device in a particular case, as well as the contents of the application for court approval of the device, and the results obtained from the installation, enforcement of these provisions is left to the discretion of the judge. (See Sec-

tion 2518(8)(a) *et seq.*) Moreover, Section 2518(8)(d) provides that within 90 days the judge shall advise the subject of the court order and, in his discretion, make available part or all of the intercepted communications. This procedure may be "postponed," but not avoided. In these circumstances, there can be little assurance that sensitive data, in a case not brought to prosecution, can be protected from public disclosure. However, it may be desirable to obtain a court order if, at the time authorization is sought for coverage, it appears that prosecution is likely. In all events, a determination whether to employ the Presidential authorization provision, or to follow the "court order" route, must be made on an *ad hoc* basis in the light of the facts of the particular case.

We shall endeavor to answer your specific questions with respect to the effect of the Act upon this, and other operations of the Bureau in this area in the order in which they were raised.

I

Procedures to be Followed by the Bureau In Requesting New Coverage and Additional Action Necessary Relative to Existing Coverage

As to the procedure to be followed by the Bureau in requesting new electronic coverage, it may be noted that Section 2518(3) sets forth the "probable cause" which must be adduced to support an application for court approval of the interception of wire or oral communications. It is manifest that all of the statutory elements must be met before the Attorney General is warranted in seeking, and the court is justified in issuing, an order approving electronic coverage, pursuant to the provisions of Section 2516, *et seq.*, of the Act. The Criminal Division is currently preparing a Manual for Conduct of Electronic Surveillance, which will contain detailed instructions regarding the form of, and the information to be contained in, future requests to the Attorney General for authorization

to apply for an interception order from the courts. The procedures outlined in the Manual should be followed whenever it is anticipated that a court order will be sought for the requested electronic coverage.

Section 2511(3), the Presidential authorization provision, provides that nothing contained in the Act or in Section 605 of Title 47, United States Code, shall limit the constitutional power of the President to take such measures as he deems necessary:

1. To protect the Nation against actual or potential attack or other hostile acts of a foreign power.
2. To obtain foreign intelligence information deemed essential to the security of the United States,
3. To protect national security information against foreign intelligence activities.

This section also provides that nothing contained in the Act shall be deemed to limit the construction power of the President to take such measures as he deems necessary to protect the United States:

1. Against the overthrow of the Government by force or unlawful means or,
2. Against any other clear and present danger to the structure or existence of the Government.

The section further provides that the contents of any communication intercepted pursuant to the Presidential powers may be received in evidence at any trial or other proceeding *where such interception was reasonable.* The requirement that the interception be "reasonable" applies only where the Government seeks to introduce at trial evidence obtained through the interception. In those instances where authority to intercept for *non-prosecutive* purposes is requested, the "resonableness" standard would not, it appears, have to be met. However, as the Supreme Court has made clear in *Alderman-Ivanov* v. *United States*, 37 U.S.L.W. 4189, and in *Giordano* v. *United States*, decided March 24, 1969, the *legality* of the interception is of prime importance in determining whether information regarding the electronic surveillance must be disclosed to a defendant whose conversations have

been intercepted. (See *Alderman-Ivanov*, *supra*, at p. 4190, n. 3 and Concurring Opinion of Justice Stewart in *Giordano.*)

Accordingly, we must insure that all approvals for permission to intercept private conversations rest upon a sound foundation sufficient to enable us to justify such coverage under the terms of the Act. To this end, we believe that, in the future, all applications to the Attorney General for permission to obtain intelligence information pursuant to the standards set forth in Section 2511(3) of the Act, should contain, at a minimum, the following information:

1. An identification of the premises and location, and the room or office, in which the interception device is to be placed or phone to which such a device is to be attached and facts regarding the installation to assist in determining whether a trespass will be involved.
2. A general description of the activities subject is engaged in and the type of information which it is anticipated will be obtained through the electronic coverage.
3. The period of time for which approval is requested, with subsequent advice as to date of installation.
4. Whether it is anticipated that the conversations of any other subject who is under active investigation for possible criminal violations will be overheard.
5. If permission is sought for electronic coverage of a diplomatic establishment or of a foreign diplomat, whether approval of the State Department has been sought and obtained.
6. If the application is for extension of time or a renewal of authority, a brief description of the type of intelligence information which has been previously obtained from electronic coverage, of these premises.

In addition to the above information, if approval is sought from the Attorney General, pursuant to Section 2511(3), for electronic coverage where it is anticipated that the results thereof will be introduced in evidence at trial,

or that leads to evidence to be introduced at trial will be obtained, the following information should be included in your request to the Attorney General for authority to intercept:

1. The crime or crimes which it is believed are being committed by the person or persons whose conversations are likely to be overheard.
2. A complete description of the investigation being conducted—its origin, development, and present status. This description should include a detailed analysis of all investigative procedures utilized and a statement as to their inadequacy and the need to use the proposed techniques.
3. The names and backgrounds of each prospective subject of the investigation.
4. A description of the communications expected to be intercepted, together with an analysis of the relevance of the communication to the investigation.

Where approval is sought to intercept communications, which it is anticipated will be introduced into evidence, a specific time period for the use of the device should be set forth, and in no event should that period exceed thirty days, subject, of course, to requests for extension.

II

Limitations on the Bureau's Dissemination of Results of National Security Electronic Coverage to other Governmental Agencies or to Agencies of Allies of the United States

Section 2511(3) of the Act specifically provides that the contents of any wire or oral communication intercepted by authority of the President shall not be otherwise used or disclosed "*except as is necessary to implement that power.*"

We interpret the provisions of Section 2511(3) as permitting the Bureau to disclose the results of such coverage to other investigative and law enforcement agencies of the

United States or of a State or political subdivision thereof which have a clear "need to know" such information, or to investigative agencies of allies of the United States who have such a "need to know" in order to assist the FBI in carrying out its counter-intelligence responsibilities in protecting our national security and enforcing applicable internal security laws of the United States. Obviously, dissemination of information obtained through electronic coverage should be strictly limited and should not, in any case, violate the dissemination limitations which are currently imposed upon classified national defense information. Moreover, whenever evidence of possible criminal conduct is developed as the result of national security electronic coverage, other than that installed pursuant to a court order, extreme caution should be exercised in the dissemination of such information and in any instance where dissemination is made outside of the FBI, the information should be clearly identified as having originated from electronic coverage. In the event a question should arise as to whether a particular item of information falls within or without these general guidelines, it is suggested that you seek the advice of the Department as to whether such dissemination should be made.

III

Procedure to be Followed by the Bureau in Preserving Tape Recordings of Intercepted Conversations

Section 2518(8)(a) of the Act provides in regard to interceptions authorized by court order:

> "The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available

> to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years."

Although we recognize the expense and storage problems which preservation of tape recordings of intercepted conversations may create, we believe this subsection clearly requires the preservation, for at least ten years, of any tape recordings of an intercepted wire or oral communication which are authorized by court order. Thereafter, such recordings may be destroyed only upon an order of the issuing or denying judge. With regard to tape recordings of wire or oral communications intercepted under the authority of the President, (Section 2511(3)), such tapes should be preserved for a minimum period of ten years.

IV

Necessity of Including Results of Electronic Surveillances Obtained in the Security Field Subsequent to Enactment of the Act When Responding to the Department's Request for a Search of the Bureau's Special Indices Solely for Determination of Tainted Evidence

As we noted under Point I, the *Alderman-Ivanov* and *Giordano* cases, require that the Government establish the legality of the electronic surveillance to the satisfaction of the District Court, where that issue has been raised by the defendant. "(T)he District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful." *Alderman-Ivanov* v. *United States*, 37 U.S.L.W. at 4190, n. 3. This will entail the production of the surveillance logs to the Court. In these circumstances, it is obvious that the Department must first review the results of the electronic surveillance prior to producing the logs to the Court.

Where the Government must admit the illegality of the surveillance, the interceptions of the defendant must be turned over to the court and the defense for an appropriate determination of relevancy.

In national security cases, as indicated in our discussion of point II, the Omnibus Crime Control Act places no limitations upon dissemination of the contents of intercepted wire or oral communications to investigative or law enforcement agencies of the Executive Branch of the Federal Government having a need to know such information.

Since all interceptions of wire and oral communications by the FBI are undertaken under the authority of the Attorney General, it seems evident that the results of such interceptions may lawfully be made available to him.

In these circumstances, you should continue to include the results of all your electronic surveillances when responding to the Department's requests for a search of your special indices for determination of tainted evidence or instances where disclosure may otherwise be called for.

March 10, 1969

The President
The White House
Washington, D.C.

Dear Mr. President:

After meeting with you the other evening and visiting around a bit, I feel I should write you to try and impress upon you the urgency of more rapid changes in personnel lest you lose control of the government.

You will recall, as I discussed with you, that President Eisenhower had this calamity befall him, and I don't want to see it happen to you, but if we can't move in the decision making areas and do it completely by another month, I think you are going to see trouble begin to arise.

As a good example, and you can check this with him, I saw Arthur Burns the other day and he cited me this experience that he had just recently. He had heard that there were discussions being held relative to financing Social Security out of the income tax. Naturally, this disturbed him as it would you or me, so he sent a memorandum down to the Treasury asking about this.

He received in due time a letter thanking him for this and stating that it was a very interesting proposal and that the Secretary would delve into it. Obviously Secretary Kennedy did not write this letter. He might not even have signed it but somebody did in the echelons of his think tank write it and it has probably by now some official stigma to it.

I cited to you the case of Mr. Kissinger taking Mr. Halperin, one of the really troublesome actors who was dismissed from the Defense Department, and I am hearing more and more tales of these people who caused so much trouble during the Johnson Administration being kept in their present jobs or being shuffled around so they are not lost.

I hope you will not mind my writing you on problems like those but, as I told you the other evening, our first job has been completed, that of getting you elected, and our next job of getting you re-elected has already begun and, while I have a feeling the job will be a lot easier, I don't want to make it any harder by having to put up with Democratic shots from within our ranks.

In closing and on another subject, I think you know of my great interest in having Bill Quinn appointed Ambassador to Greece, and I have one further suggestion; if you haven't picked one for Ireland, one of your best friends and a wonderful Republican woman, Rose Saul Zallas, would be great for that spot.

With warm wishes and respect,

Barry Goldwater

BG/judy

UNITED STATES SENATE

WASHINGTON, D.C. 20310

PERSONAL AND CONFIDENTIAL

April 22, 1969

The Honorable John Mitchell
The Attorney General
Department of Justice
Washington, D.C.

Dear John:

First, I want you to know how much I enjoyed visiting with you at lunch the other day and I only hope we can do it once in a while in the interest of the Party.

I told you I would send you a list of names and here they are: Halperin is on the NSC staff and, as I understand it, works under Kissinger; [DELETED]

These are the people who made it so hard for the military to operate in the Pentagon by their strategic papers which were forced down the throats of the Joint Chiefs and Commanders. I really thought that Mel had gotten rid of most of them but, obviously, he hasn't and unless he has a good reason for keeping them, I am afraid it will mean trouble.

With best wishes,

Barry Goldwater

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

10:35 AM May 9, 1969

MEMORANDUM FOR MR. TOLSON
MR. DE LOACH
MR. SULLIVAN
MR. BISHOP

Dr. Henry A. Kissinger, National Security Adviser to the President, called from Key Biscayne, Florida. He advised that there is a story today on the front page of the New York Times by William Beecher which is extraordinarily damaging and uses secret information. Dr. Kissinger said they wondered whether I could make a major effort to find out where that came from. I said I would. Dr. Kissinger said the article is in the lower right hand corner of the front page and to put whatever resources I need to find who did this. I told him I would take care of it right away. Dr. Kissinger said to do it discreetly, of course, but they would like to know where it came from because it is very damaging and potentially very dangerous. I commented it is this kind of thing that gives us headaches of where they come from; that if we can find the source one time and make an example it would put a stop to it. Dr. Kissinger agreed and said that is what they propose to do.

Very truly yours,
JOHN EDGAR HOOVER
Director

[What do you suggest?]

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

5:05 PM May 9, 1969

MEMORANDUM FOR MR. TOLSON
MR. DE LOACH
MR. SULLIVAN
MR. BISHOP

I called Dr. Henry A. Kissinger, National Security Adviser to the President, at Key Biscayne, Florida. I told him I had some information which I thought he ought to know about so as to bring him up to date.

I told him that in regards to the background of William Beecher, who wrote the article in the New York Times today, he is formerly from the St. Louis Globe Democrat and then went to the Wall Street Journal and was later employed by the New York Times. He has been active in the U.S. Army reserve program for a period of time and is described as particularly astute as to military affairs. Our investigation led to nothing very definite except the possibility that his story was primarily on informed speculation as there had been made available publicly a lot of source material from which he could draw his conclusions.

I stated that in regard to the current three articles, it is the conclusion of the contracts we have made that it could have come and probably did from a staff member of the National Security Council. I continued that Beecher while at undergraduate school at Harvard had a roommate who is now a staff member of the National Security Council. There is a strong possibility also that he may have gotten some of his information from the Southeast Asian Desk Public Affairs Office of the Department of Defense, as the Public Affairs Office is constituted of employees who are pronounced anti-Nixon. I continued that Beecher frequents this office as well as the National Security Council and the employees freely furnish him information inasmuch as they are largely Kennedy people and anti-Nixon.

I said that also in the Systems Analysis Agency in the Pentagon, there are at least 110 of the 124 employees who are still McNamara people and express a very definite Kennedy philsophy.

6:05 PM May 9, 1969

MEMORANDUM FOR: MR. TOLSON
MR. DE LOACH
MR. SULLIVAN
MR. BISHOP

I called Dr. Henry A. Kissinger, National Security Adviser to the President, at Key Biscayne, Florida. I told him I had some information which I thought he ought to know about so as to bring him up to date.

I told him that in regards to the background of (Beecher) who wrote the article in _____ today, he is formerly from the _____ and then went _____ and was later employed by _____. He has been active in the U.S. Army reserve program for a period of time and is described as particularly astute as to military affairs. In 1968 at the request of Marvin Watson, Assistant to the President at that time, we conducted an investigation as to a leak of information concerning United States government policy in the anti-missile field in connection with an article by (Beecher) in of December__, 1966. Our investigation led to nothing very definite except the possibility that his story was primarily on informed speculation as there had been made available publicly a lot of source material from which he could draw his conclusions.

I stated that in regard to the current three articles, it is the conclusion of the contacts we have made that it could have and probably did from a staff member of the National Security Council. I concluded that (Beecher) while at un-

dergraduate school at _____ had a roommate who is now a staff member of the National Security Council. There is a strong possibility also that he may have gotten some of his information from the Southeast Asian Desk, Public Affairs Office of the Department of Defense, as the Public Affairs Office is constituted of employees who are pronounced anti-Nixon. I continued that (Beecher) frequents this office as well as the National Security Council, and the employees freely furnish him information inasmuch as they are largely Kennedy people and anti-Nixon. I said that also in the Systems Analysis Agency in the Pentagon, there are at least 110 of the 124 employees who are still McNamara people and express a very definite Kennedy philosophy.

I continued that this situation has made it very easy for Beecher to obtain information; however, the source we have been working through said it should not be ruled out that a staff member of the National Security Council who obviously was in a position to know the information contained in all three articles could have assisted Beecher. Dr. Kissinger said he has heard this as an allegation, too, but there is no proof; that he has heard it as a speculation. I said, of course, this is speculation all the way through tying it into this and Halperin. I said that Beecher works full time at the Pentagon and was asked today as to what his source of information was, and he said it was an excellent one. He said that his source was from the Air Force, but he did not reveal any names. I continued that he stated the Air Force was particularly anxious to soften up its press in its bomber program and is endeavoring to obtain a favorable image with the press. I commented that I thought that was probably a misleading statement by Beecher to throw it into the Air Force.

I continued that there is a man named Eagleburger who attended the Central State College at Stevens Point and the University of Wisconsin and is presently a State Department Foreign Service officer on detail to the National Security Council at the White House. I said he was for-

merly an assistant to former Under Secretary of State Nicholas Katzenbach and is a close friend of Beecher.

I said in regard to Halperin, we conducted an applicant investigation of him in 1963 and in February 1969 and the investigation reflected Halperin and other experts in his field are of the opinion that the United States leadership erred in the Vietnam commitment as we did not possess the interest or capabilities to obtain the original objectives. I said that in 1965 his name appeared on a list of individuals who responded to a request for a public hearing on Vietnam by agreeing to sponsor a national sit-in. I said the [DELETED] 1965 advised that Halperin's name was on a list of Americans who had reportedly received the World Marxist Review Problems of Peace and Socialism, a communist publication.

I continued that from another source it was indicated we should not overlook the Systems Analysis Agency in the Defense Department who had an employee named Ivan Selin and another named Halperin currently employed as staff employee of the National Security Council. I said they are very close to each other and both are so-called arrogant Harvard-type Kennedy men who would not hesitate to do anything to save their jobs. I said it was stated that Halperin was particularly anxious to save Selin's job with the Systems Analysis Agency. I said both men know Beecher and consider him a part of the Harvard clique, and, of course of the Kennedy era and we should not ignore the possibility that Halperin and/or Selin could be the source of the leak to Beecher.

I said that is as far as we have gotten so far. Dr. Kissinger said he appreciated this very much and he hoped I would follow it up as far as we can take it and they will destroy whoever did this if we can find him, no matter where he is.

I told Dr. Kissinger I wanted him to know the developments and he said he appreciated it very much and they will certainly keep looking into it at their end. I told him

we would keep after it and he said they were counting on whatever we can find out.

/s/
JOHN EDGAR HOOVER
Director

May 11, 1969

To: Mr. C. C. DeLoach

From: W. C. Sullivan

Subject: COLONEL ALEXANDER M. HAIG
TECHNICAL SURVEILLANCE
REQUEST

Pursuant to my conversation with the Director, Sunday, May 11, 1969, there is enclosed a memorandum for the Attorney General which the Director may want to discuss personally with the Attorney General. It involves a high-level request for technical surveillance on four individuals whose names are contained in the memorandum.

As I told the Director, the request emanated from Colonel Alexander M. Haig, who is assigned to Dr. Henry A. Kissinger's staff. Haig came to my office Saturday to advise me the request was being made on the highest authority and involves a matter of most grave and serious consequence to our national security. He stressed that it is so sensitive it demands handling on a need-to-know basis, with no record maintained. In fact, he said, if possible it would even be desirable to have the matter handled without going to the Department; however, I was told the Attorney General is aware in general of the main elements of this serious security problem.

Colonel Haig said it is believed these surveillance will only be necessary for a few days to resolve the issue. We, of course, can handle the matter most discreetly through our Washington Field Office. Colonel Haig said it is not desired that there be any formal dissemination of the results of our coverage to his office. Instead, he will come to

my office to review the information developed, which will enable us to maintain tight control of it.

RECOMMENDATION:

If approved, attached memorandum will not be filed but will be maintained in a secure, off-the-record capacity as basis for authority to proceed in response to this request.

Enclosure

UNITED STATES DEPARMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

May 12, 1969

MEMORANDUM FOR THE ATTORNEY GENERAL

RE: COLONEL ALEXANDER M. HAIG
TECHNICAL SURVEILLANCE REQUEST

On May 10, 1969, Colonel Alexander M. Haig, who is assigned to Dr. Henry A. Kissinger's staff, came to this Bureau to advise that a request was being made on the highest authority which involves a matter of most grave and serious consequence to our national security. He stressed that it is so sensitive it demands handling on a need-to-know basis, with no record maintained. He requested that telephone surveillance be placed on the following individuals to determine if a serious security problem exists: |DELETED| Morton H. Halperin; |DELETED|.

|DELETED|

Halperin, aged 30, was detailed from the Department of Defense to the National Security Council as a senior staff member on January 21, 1968. He was the subject of an applicant-type investigation by this Bureau. While admittedly he has had contact with Soviet nationals the investigation did not disclose at that time any pertinent derogatory information.

Colonel Haig is Military Assistant to the Assistant to the President for national security affairs. He was the subject of an applicant-type investigation and no derogatory information was developed concerning him.

This Bureau is in a position to conduct the necessary telephone surveillances requested by Colonel Haig.

Respectfully,

/s/ _
JOHN EDGAR HOOVER
Director

APPROVED /s/ _____
JOHN N. MITCHELL

DATE: 5/12/69

UNITED STATES GOVERNMENT

Date: May 15, 1969

Memorandum

To Mr. C. D. DeLoach

From: William C. Sullivan

Subject: COLONEL ALEXANDER HAIG
TECHNICAL SURVEILLANCE
REQUEST

As you know, we are running technical surveillances on the four persons in whom Dr. Kissinger is intensely interested. To date, no information has been developed that would identify sources of leaks to The New York Times or elsewhere.

In the case of Mr. Halperin, he has discussed this matter briefly with his wife, who seems to be overtalkative.

This matter is being closely followed and handled with greatest possible security. The Director will be promptly informed the moment anything significant in regard to identification of sources has been secured.

RECOMMENDATION:

(1) This is for the information of the Director.

(2) This memorandum should be returned to me so that I may keep all material in connection with this matter in one secure location.

WCS:mls
Original only

May 20, 1969

Dear Mr. Hoover:

Following my conversation with you this mornng, Dr. Henry Kissinger and Colonel Haig came into the office around 11:45. Dr. Kissinger read all the logs. On doing this, he said "it is clear that I don't have anybody in my office that I can trust except Colonel Haig here." He mentioned that he was under great pressures to adopt a soft line on foreign policy. But he said he is not going to do so. He did not mention where the pressures came from, but I got the impression that he meant the Department of State and possibly one or two others high in the administration. He indicated that President Nixon definitely wanted to maintain a hard line.

Dr. Kissinger said he wanted the coverage to continue for a while longer yet on the first four names, and to which will be added two new ones I sent over to you today. He said that what he is learning as a result of this coverage is extremely helpful to him while at the same time very disturbing. He said he had not decided how to handle this problem but he did not see as he could delay it much longer. He said that Colonel Haig, as in the past, would come over to read the logs. He asked to be remembered to you.

Respectfully submitted,

/s/ _____

BILL SULLIVAN

UNITED STATES GOVERNMENT

Date: May 28, 1969

Memorandum

TO: Mr. C. D. DeLoach

FROM: W. C. Sullivan

SUBJECT: COLONEL ALEXANDER M. HAIG
TECHNICAL SURVEILLANCE
REQUEST

Pursuant to the Director's request, there is enclosed with this memorandum a letter from the Director to President Nixon setting forth some extremely sensitive material on Morton H. Halperin and [DELETED] developed yesterday through our delicate coverage.

Colonel Alexander Haig read the material this morning and expressed his grave concern and said he would transmit the details of this to Dr. Henry Kissinger.

Because of the explosive nature of this operation, I would like to restate the original request made by Colonel Haig to me. It will be recalled he said that the instructions for the Bureau's assistance in this matter came from the highest authority; however, to protect the highest authority he would read the materials and advise Dr. Henry Kissinger. He further stated he did not want any of the logs sent over to Dr. Kissinger's office but that he would read it here and have it kept here. In view of this, I would like to suggest that the Director consider taking this matter up personally and directly with President Nixon rather than having it carried to the President. I suggest this because of the sensitivity related above and that the only way that it could be made known to President Nixon without an intermediary would be through the Director. Additionally, President Nixon might not want anyone else in his office to know of this matter. Lastly, the Director might want to discuss this directly with Dr. Kissinger first.

RECOMMENDATIONS:

(1) For the information and consideration of the Director.

(2) That this memorandum be returned to W. C. Sullivan to be retained with the rest of this extremely sensitive material.

Enclosure

WCS:lml
(Original only)

THE WHITE HOUSE
WASHINGTON
MEMORANDUM

TOP SECRET SENSITIVE June 4, 1969

MEMORANDUM FOR MR. KISSINGER

FROM: Al Haig

SUBJECT: Talking Points for Meeting with J. Edgar Hoover, Wednesday, June 4 at 9:30 a.m.

1. Express your appreciation to Mr. Hoover and Mr. Sullivan for their outstanding support in recent weeks in uncovering security problems within the NSC staff. Inform Mr. Hoover that you have discussed these problems in detail with the President (and with Messrs. Haldeman and Ehrlichman).

2. Tell Mr. Hoover of the action to be taken with respect to [DELETED].

3. Ask Mr. Hoover for his views on how we should proceed with Halperin, who has been involved in indiscretions and who obviously has a reputation for liberal views but who has yet to be firmly linked with a security breach. I think it best that you seek Mr. Hoover's advice in this instance while avoiding any specific comments pro or con and especially avoiding any opinions on this matter.

4. Request Mr. Hoover's advice on how to proceed with

5. Ask Mr. Hoover if he has any additional information or guidance which he feels would be helpful in this very difficult situation. Specifically you might inquire about the requirement for prolonging the taps, making it clear that the President wishes to terminate them as soon as possible. (I think in the case of Halperin and [DELETED] that they should be kept on for at least another two weeks so that a pattern of innocence can be firmly established.

UNITED STATES GOVERNMENT

DATE: June 20, 1969

TO: Mr. C. D. DeLoach

FROM: W. C. Sullivan

SUBJECT: COLONEL ALEXANDER HAIG
TECHNICAL SUPVEILLANCE
REQUEST

Relative to the extremely sensitive technical surveillances we have going on, there has been nothing of late relevant to the leaks. In view of this fact, I have suggested to Colonel Haig that he might want to consider discontinuing some of them. He agreed. Therefore, the three to be discontinued are [DELETED] and [DELETED]. The Attorney General will be notified by separate memoranda.

RECOMMENDATIONS:

(1) For the information of the Director.

(2) That this memorandum be returned to W. C. Sullivan to be retained with the rest of this extremely sensitive material.

WCS:lml

July 8, 1969

Dear Mr. Hoover:

In regard to our very sensitive coverage on Halperin of the National Security Council, et cetera, as I have previously stated nothing has come to light that is of significance from the standpoint of the leak in question. I am suggesting to Colonel Haig that some of this coverage be removed. I had previously suggested the removal of the coverage of [DELETED] and he agreed.

As we know Halperin cannot be trusted. We have learned enough already from the early coverage of him to conclude this. Since [DELETED] Halperin has said almost nothing on the telephone. My guess is that he assumes it is tapped. There is a marked contrast between his lengthy conversations before that time and almost no conversation now.

[DELETED]

I am making a careful over-all analysis of the aforementioned sensitive coverage and it will be submitted to you for whatever use you may decide to make of it.

/s/
WILLIAM C. SULLIVAN

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

August 1, 1969

Honorable Henry A. Kissinger
Assistant to the President
for National Security Affairs
The White House
Washington, D.C.

Dear Mr. Kissinger:

Previous communications have set out information which we obtained from extremely sensitive sources concerning contacts made by members of the White House staff.

There is enclosed a memorandum furnishing a resume of information obtained to date.

Sincerely yours,

/s/

J. EDGAR HOOVER

Enclosure

MORTON H. HALPERIN

[DELETED FROM THIS APPENDIX
BY STIPULATION]

On May 27, 1969, Henry Brandon asked Halperin to track the Rusk memo about "Don't Go In." He also asked Halperin whether he had any comments on peace or not and Halperin replied none beyond those he gave Brandon "the other night." Subsequently, Halperin spoke to a Dr.

Gilm (phonetic) who is probably identical with Dr. Leslie H. Gelb, a former Deputy Assistant Secretary of Defense for Policy Planning and Arms Control, who is now connected with the Brookings Institution, during which Gilm and Halperin agreed that they were in favor of the United States using force to repel the Soviets the next time they invaded any European country. Gilm said that "they" are going to wait until all the subversive elements in the Administration are dangling by their last string and then they will move in and cart them away. Gilm also said "They don't believe in the policies being pursued, they're not going to start fighting them." Halperin commented that they had moved to the joint staff position on all issues and told Gilm about "our supplemental fiasco."

According to Halperin, the Secretary of Defense sent a memo to the Budget Director to put in the Budget and to announce in the President's aid message. He said the Secretary had not told the State Department about it and that the Budget Bureau recommended against it as did Kissinger's staff, although Kissinger recommended it. He said that the President approved it, but that the Undersecretary of Defense Packard sent a memo to the President pointing out that it would not get through Congress and, therefore, the President should not ask for it. Based on this, the President decided not to ask for it. He said that he did not know who wrote the memo for Packard.

Halperin then asked about the Rusk memo and was told by Gilm that it was not a memo, but a 1961 cable, and was in connection with stepping up the number of advisors (probably in Vietnam).

Halperin then said that "We are waiting for the propitious international climate regarding the arms talks," and that the committee was supposed to meet to approve a report which the National Security Council (NSC) will discuss after the President gets back. He said that the NSC staff was hostile to the report and that Henry has been convinced that there is no strategic rationale for an arms control view. He said that Henry has told reporters and senators that they will be embarrassed in opposing MRVs

because he is going to show "it's silly." Halperin said it was going to be an interesting battle by the State Department against Defense and the White House.

On July 10, 1969, Halperin told Brandon that the Premier of South Vietnam was making a speech that night and that the South Vietnamese Ambassador would make a press release. He said the speech and the press release would offer to let the National Liberation Front participate in elections. Brandon mentioned the President's trip to Romania and the fact that the President had received no written invitation. Halperin commented that the President assumes he has an invitation from everyone. He then agreed to help Brandon on a speech concerning the long-range influence of domestic affairs on American foreign policy. He arranged to have dinner with Brandon on the evening of July 16, 1969.

During a contact with Jay (probably Jeremy Stone) Jay stated he was leaving for Miami to speak before the New Party of Florida. Jay said that he contemplated a series of papers on "Arms Control and the Political Process." Halperin commented that a format of specific issues would be better. They agreed that Kennedy's office had placed various "professional documents" in the "Congressional Record" regarding the ABM. Halperin felt that the proponents of the President's plan were "in over their heads."

[DELETED FROM THIS APPENDIX BY STIPULATION]

DO NOT FILE

Date: September 15, 1969

To: Mr. C. D. DeLoach

From: W. C. Sullivan

Subject: SENSITIVE WHITE HOUSE TECHNICAL SURVEILLANCES

The Director has asked that we identify the sensitive technical surveillances which we have had in effect for a short period of time at the request of the White House.

At the request of Dr. Kissinger's office, we have surveillances in effect at this time on [redacted] and Morton Halperin, [redacted] Colonel Alexander Haig of Dr. Kissinger's office has indicated that Dr. Kissinger desires all surveillances discontinued except those on Morton Halperin and [redacted]

In this connection, there is attached a suggested memorandum to the Attorney General advising of the discontinuance of the surveillances on [redacted]

At the request of the Attorney General, who instructed that reports in this connection be sent to him and to the Honorable John D. Ehrlichman, Counsel to the President, we have a telephone, as well as physical, surveillance on [redacted] By memorandum dated 9/8/69 we advised the Attorney General that these surveillances were producing no information of pertinence and asked if they should be discontinued. The Attorney General has not as yet responded and, accordingly, we are separately writing a follow-up memorandum to the Attorney General pointing out the manpower requirements in this kind of surveillance and asking for an early decision as to whether or not these surveillances should be discontinued.

(49)

ACTION:

Attached is a suggested memorandum to the Attorney General advising of the discontinuance of the telephone surveillance with reference to [redacted]

JAS:mls
Enclosure

DO NOT FILE

NOT RECORDED

JUN 12 1973

188

2-Orig. and 1
1-yellow

The Attorney General

September 15, 1969

(50)

Director, FBI

COLONEL ALEXANDER HAIG
REQUEST FOR TECHNICAL SURVEILLANCES

Reference is made to prior correspondence concerning the telephone surveillances which we have had in operation at the request of Dr. Henry Kissinger at the White House.

According to Colonel Alexander Haig, Dr. Kissinger has now advised that he desires all such surveillances installed at his request discontinued except the ones with reference to Morton Halperin and [redacted] Accordingly, the surveillances on [redacted] and [redacted] are being discontinued today.

SENT FROM D. O.
TIME
DATE
BY

JAS:mls (3)
(Classified SECRET because unauthorized disclosure could adversely affect national security.)

NOT RECORDED
JUN 12 1973

Tolson
DeLoach
Mohr
Bishop
Casper
Callahan
Conrad
Felt
Gale
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

JUN 16 1973

MAIL ROOM ☐ TELETYPE UNIT ☐

DS

THE WHITE HOUSE
WASHINGTON

October 31, 1969

MEMORANDUM FOR

THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE DIRECTOR, CENTRAL INTELLIGENCE AGENCY
THE CHAIRMAN, JOINT CHIEFS OF STAFF
THE DIRECTOR, ARMS CONTROL AND DISARMAMENT AGENCY
THE DIRECTOR, UNITED STATES INFORMATION AGENCY
THE CHAIRMAN, ATOMIC ENERGY COMMISSION

SUBJECT: Avoidance of Leaks on SALT

As we enter SALT, it is of first importance that the security of our plans be maintained and that all in the Government speak with one voice.

The basic procedure for ensuring this was established in my directive of September 15, 1969, issued at Colordao Springs. The operative parts of this directive follow:

"1. Public Statements and Press Releases: Prior to release, all public communications on matters of known or potential Presidential interest must be carefully cleared by the White House (Assistant to the President for National Security) for consistency with Presidential policy and for coordination with the departments and agencies who share overlapping interests and responsibilities. Should there by any uncertainty as to Presidential or interdepartmental interest, it will be resolved in favor of clearance.

"2. Official communications: All official communications with policy implications must be cleared by the White House. When in doubt, the rule is that messages will be so cleared. This procedure requires close and confidential staff relationships at all levels between the White House and your Department as well as among departments."

In addition, for routine and purely operational matters relating to SALT, public and background statements and guidance for such statements, should be dealt with by the backstopping machinery which was established at my direction in Henry Kissinger's memorandum to the Under Secretary of State on September 6, 1969.

Leaks about SALT planning and divergent statements to the public, Congress or foreign governments can clearly endanger the national interest and security. Special precautions should therefore be taken to avoid unauthorized disclosures or renditions of the Administration's views that have not been approved by the procedures referred to above.

/s/RICHARD NIXON

December 29, 1969

Honorable Henry A. Kissinger
Assistant to the President
for National Security Affairs
The White House
Washington, D.C.

Dear Dr. Kissinger:

Previous communications have set forth information which we obtained from extremely sensitive sources concerning contacts made by Morton H. Halperin, a former White House staff member who is now employed by the Brookings Institution.

Halperin was recently in contact with an unidentified individual who told Halperin that he had received a call from Clark Clifford. Clifford is probably identical with the former Secretary of Defense. According to this individual he and Clifford discussed an article which Clifford may be preparing. He said that Clifford is concerned about "sharpening up his attack on Nixon" and that apparently

he had obtained "old Nixon statements," one being to the effect that President Thieu is one of the five greatest men of our time. Another statement is that Vietnam is one of the finest hours in United States history. He said that Clifford felt that whether the article will be published will depend on what alternative he, Clifford, has to offer and that Clifford asked him what alternative he could offer. This unidentified individual did not indicate what he told Clifford.

This individual also wondered whether he could ethically go to a meeting with "Henry" today, December 29, 1969, to discuss the same subject, as Tony Lake (phonetic) had told him "Henry" wants to see him then. He also told Halperin that an article may appear in "Life" magazine which would be followed by an interview of Clifford in "Time" magazine. Clifford then may appear on "Meet the Press." This individual then discussed the fact that he had to submit an outline of the article and an introduction to it to Clifford. He said that he had told Clifford that the main thrust of the article should be "everything out by the end of 1971," and that Clifford had not rejected this idea.

Sincerely yours,

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

January 8, 1970

MEMORANDUM FOR: MR. MAGRUDER

FROM: ALEXANDER P. BUTTERFIELD

RE: J. Edgar Hoover's December 29 Letter to the President Concerning Mort Halperin and Clark Clifford

It would be interesting to me—first of all—to go to Al Haig (not to Tony Lake) and find out who participated in Henry's December 29th meeting. If he had more than one group meeting on that day, you could say it is your understanding that this particular meeting concerned Vietnam and options to our future courses of action there.

I would want to get ahold of the speeches or talks in which Mr. Nixon made the statements mentioned in the second paragraph . . . in order to know and understand the context in which the statements were made.

Needless to say, this item is every bit as sensitive as the memorandum indicates.

The name of the game, of course, is to springload ourselves to a position from which we can effectively counter whatever tack Clifford takes . . . and it would appear that this memorandum provides the basic framework for his plan.

THE WHITE HOUSE
WASHINGTON

January 15, 1970

CONFIDENTIAL

MEMORANDUM FOR: H. R. HALDEMAN
JOHN D. EHRLICHMAN

FROM: JEB S. MAGRUDER

RE: Impending Article by Clark Clifford Against Our Policy in Vietnam

J. Edgar Hoover's memorandum to the President regarding the potential problem that is developing with Clark Clifford has been checked out thoroughly. He is going to write an article for LIFE that will be published within the next month. As far as we know, it will be a very strong article against our policy in Vietnam, utilizing quotes and information he has regarding the President, and probably suggesting complete troop withdrawal by the end of 1970.

We are in a position to counteract this article in any number of ways. It has been suggested that the best approach would be to run a simultaneous article in LOOK about our success in Vietnam by someone like Dean Acheson. I have asked Al Haig to see if this could be done. There might be other people who could also write similar articles. I am thinking particularly of Sir Robert Thompson.

We could also be prepared to launch an effective counteraction if we felt it was warranted, by utilizing Administration spokesmen on television, by letters to LIFE relating the true context of the President's remarks, or by relating some of Clifford's activities to the press that would indicate the hypocrisy of his position. It has also been suggested that doing nothing might be the most effective response. We do not have much time to develop countermeasures of the type I have indicated unless it is decided to go ahead. Please give me your opinion as to the correct approach as soon as possible.

CONFIDENTIAL

1 Mushel from DOD all the facts
of the Clifford Secretaryship
a - Peek what is bad about the
re vietnam to be alone
et al
2 Get Dean Rusk involved.
3 Continue the effort to get support from
HHH, Westmoreland &
Acheson, Lodge.
et al
4. Activate the Douglas committee,
5 A major release from DOD on
How the war escalated (in det
Names those involved.
Etc, etc (the rise, & decline
of the Vietnam war).

THE WHITE HOUSE
WASHINGTON

January 12, 1970

MEMORANDUM FOR JEB MAGRUDER
FROM: JIM KEOGH
SUBJECT: The President's Remarks About Vietnam and President Thieu

On July 30, when the President was visiting United States troops at the headquarters of the First Infantry Division at Di An in Vietnam, he centered his remarks on the difficulties of the U.S. role in the war. In the course of these remarks, he praised the men for fighting on courageously despite divided opinion and a lack of understanding at home. He reaffirmed the American goal of bringing the war to an early end in a way that would enable the people of South Vietnam and of Asia to choose their own way and to have real peace. After commenting that this period of history probably will be remembered as the time when men landed on the Moon, he said: "But also out here in this dreary, difficult war, I think history will record that this may have been one of America's finest hours, because we took a difficult task and we succeded."

The following day, chatting with reporters on Air Force One, as he flew toward New Delhi, the President discussed his visit to Vietnam and expressed new praise and support for the Saigon Government. So far as I know, there is no transcript of these remarks, so we have no precise record of the President's words. However, Max Frankel of the *New York Times* reported: " . . . He called Mr. Thieu probably one of the four or five best political leaders in the world." Don Oberdorfer of the *Washington Post* wrote that he called President Thieu "one of the four or five best politicians in the world." The *Washington Star* put it this way: "He described Thieu as a very capable guy, an excellent politician—probably one of the four or five best in the world."

It seems to me that neither statement is particularly vulnerable when placed in context; the trouble is that they will be used out of context.

E

THE SUMMER WHITE HOUSE
SAN CLEMENTE, CALIFORNIA

H—

This is the kind of early warning we need more of—

Your game planners are now in an excellent position to map anticipatory action—

A kindred question — what is the plan when the VC mount GVN forces for the first

JOHN EHRLICHMAN

THE SUMMER WHITE HOUSE
SAN CLEMENTE, CALIFORNIA

time and the
concept of
"Vietnamization" is
under heavy
attack?

JOHN EHRLICHMAN

THE WHITE HOUSE
WASHINGTON

DATE _____

TO: M

FROM: BOB HALDEMAN

FYI _____ PLEASE HANDLE ✓

PLEASE REVIEW AND SEE ME _____

OTHER:

I agree with
this point.
Let's get going

H

Prepared for
Director Hoover
5/12/70

SENSITIVE TECHNICAL COVERAGE
AT REQUEST OF THE WHITE HOUSE

At the request of the White House, we have telephonic surveillances on [redacted] Halperin, a former member of the White House staff [illegible] employed by the Brookings Institution: [redacted]

On May 12, 1970, Brigadier General Alexander M. Haig of Dr. Kissinger's staff, requested additional telephone surveillances on [redacted] are being prepared requesting the Attorney General's approval of this coverage.

Since the President's announcement on April 30, 1970, of the invasion of Cambodia, we have received considerable information through these installations. For example, [redacted]

We learned through these sources that Halperin, who was serving as a consultant to the National Security Council, planned to resign to protest the invasion of Cambodia. He subsequently did resign. During conversations with other individuals Halperin indicated that he feels the President intends to attack North Vietnam and Laos and agreed to work with Senator Fulbright (D - Arkansas) in opposing the war. Halperin also stated he had contacted Kuntsler, who may be identical with William Kuntsler, the attorney for the individuals recently convicted for violation of the antiriot laws at Chicago, Illinois. Kuntsler allegedly is willing to join an "organization" being formed by Halperin and other individuals.

[redacted]

ENCLOSURE

65-750-5-382

The above are the highlights received from this coverage during the past few days. It has received very limited dissemination going only to the President and Dr. Kissinger.

FOR DISSEMINATION

May 13, 1970

[redacted]

Memorandum to W. C. Sullivan: [redacted]

Following the Director's return from the White House, he called and issued some very specific instructions to me which I desire to pass on to you in a strictly personal and confidential manner. The Director may have called you about the same matters. Nevertheless, I think it wise for you personally to be acquainted with the instructions he gave me.

(1) [redacted]

(2) The Director desires that if you, Haynes, or anyone of us receives instructions from anyone at the White House in the future regarding the establishment of a "super secret technical surveillance" (of which you are personally familiar, i.e., calls from General Haig, Dr. Kissinger, et al.), we should immediately advise that person that the FBI will be glad to comply but that these instructions must be cleared with Mr. Haldeman before the FBI can take any action. The Director, of course, wants to be immediately notified when such requests are received from Mr. Haldeman.

(3) The products of such technical surveillance coverage, as mentioned in (2), should no longer be disseminated to the Attorney General or to anyone in the Department. As a matter of fact, dissemination is to be given only to Mr. Haldeman in the future. Dr. Kissinger nor anyone else at the White House is to receive such information directly from the FBI. The Director has specified that this instruction be meticulously followed inasmuch as the President is anxious to cut down leaks that are occurring at the present time. This, of course, applies only to the type of surveillance described above and not to the general run of information which we ordinarily disseminate on a daily basis.

[redacted] Continued.....Over

JUN 12 1973

JUN 12 1973

203

[redacted]

Memorandum to W. C. Sullivan, May 13, 1970

(4) [redacted]

Please see to it that these instructions are carried out immediately. The Director specified that only you and I are to know of the above information. He, of course, will advise Mr. Tolson personally.

[redacted]

Sincerely,

C. D. DeLoach

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TO BE FURNISHED PLAINTIFF

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: 5/15/70

DO NOT FILE

TO: MR. W.C. SULLIVAN
FROM: R.H. HAYNES
SUBJECT: TECHNICAL SURVEILLANCE REQUEST
WHITE HOUSE

In accordance with the Director's meeting with the President on 5/13/70, the results of very sensitive coverage requested by the National Security Council were personally delivered by liaison to Mr. H.R. Haldeman on 5/14/70.

Haldeman advised Liaison Supervisor R.H. Haynes that this material, at the President's specific instructions, was to be handed to him personally, and in the event of his absence, it was to be given sealed to his Assistant, Lawrence M. Higby. He instructed Higby, in the presence of the liaison Supervisor, that Higby was to hold it unopened for Haldeman.

Material previously furnished to General Haig for Dr. Kissinger would remain in that office. Haldeman advised that the material he receives would be kept in his personal safe in his office, and when he finished with specific items, he would return them to the Bureau through the same channels for destruction.

Haldeman stated that, in view of the fact that Kissinger would no longer be receiving this material, he would advise him on the evening of 5/14/70 of the President's instructions.

JULY 12, 1970
Sunday

Hall

Halperin has been in California about 3 weeks and will stay out there until at least end of August. I haven't noticed much info of value in recent months from Coverage — suggest consider discontinuing.

Carl J.

THE WHITE HOUSE

WASHINGTON

December 21, 1970

MEMORANDUM FOR: The Secretary of State
The Secretary of Defense
The Attorney General
The Director, U.S. Arms Control and Disarmament Agency
The Chairman, Joint Chiefs of Staff
The Director of Central Intelligence
The Administrator, National Aeronautics and Space Administration

SUBJECT: Disclosures of Classified Information and Coordination and Clearance of Official Statements

I am becoming increasingly concerned about the disclosure in public media of classified information bearing upon important aspects of national security, particularly that which tends to jeopardize intelligence sources and methods. Such disclosures present a serious threat to our national interests and I am determined that the practice of releasing such information without proper authorization will be brought to an end.

Executive Order 10501, of December 15, 1953, as amended, established regulations and procedures for safeguarding classified information, while especially sensitive data are protected by special systems of clearances.

I direct that immediate steps be taken within the jurisdiction of each addressee to ensure that existing regulations and procedures

DECLASSIFIED
Auth: Brent Scowcroft
Date: June 24, 1976
By:
NATIONAL SECURITY COUNCIL

designed to safeguard classified information be reviewed and strengthened where necessary. These regulations and procedures should assure that only those individuals with a demonstrated "need-to-know" receive classified information and that all recipients are constantly aware of the necessity to protect it from public disclosure. They should provide for an adequate security review of all statements and documents made public on subjects with important security connotations. Further, I wish responsible officials to take firm disciplinary action against individuals under their jurisdiction found responsible for careless or deliberate mishandling of classified information.

The Director of Central Intelligence has the statutory responsibility for the protection of intelligence sources and methods. Accordingly, I shall look to him to provide guidance in this field, especially through the machinery of the intelligence community. I shall expect him to keep me informed of developments and I wish department and agency heads to cooperate fully with him.

I also reaffirm the following instructions which I issued on September 1, 1969 concerning coordination and clearance of public statements and press releases and the necessity for White House clearance of all official communications having policy implications:

--"Public statements and press releases: Prior to release, all public communications on matters of known or potential Presidential interest must be carefully cleared by the White House (Assistant to the President for National Security) for consistency with Presidential policy and for coordination with the departments and agencies who share overlapping interests and responsibilities. Should there be any uncertainty as to Presidential or interdepartmental interest, it will be resolved in favor of clearance."

--"Official communications: All official communications with policy implications must be cleared by the White House. When in doubt, the rule is that messages will be so cleared. This procedure requires close and confidential staff relationships at all levels between the White House and your department as well as among departments."

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UNITED STATES GOVERNMENT

Memorandum ROUTE IN ENVELOPE

Tolson
Sullivan
Mohr
Bishop
Brennan, C.D.
Callahan
Casper
Conrad
Dalbey
Felt
Gale
Rosen
Tavel
Walters
Soyars
Tele. Room
Holmes
Candy

TO : MR. TOLSON

DATE: 2/10/71

FROM : W. C. SULLIVAN

DO NOT FILE

JUNE

SUBJECT: SPECIAL COVERAGE AT THE REQUEST OF THE WHITE HOUSE

Pursuant to your request, the names of the men in question and the date that the coverage was put on is set forth below:

SUBJECTS;	DATE COVERAGE INSTALLED
Morton H. Halperin, works at Brookings Institution	May 12, 1969

NOT RECORDED

JUN 12 1973

The Attorney General's approval in writing has been secured for each one.

Colonel Alexander M. Haig of Dr. Kissinger's office has in the past indicated that they intend to take some of these off. No definite word as yet has been received relative thereto.

CONTINUED - OVER

WCS:chs
(ORIGINAL ONLY)

209

RECOMMENDATION:

For your information.

ROUTE IN ENVELOPE

DO NOT FILE

JUNE

February 11, 1971

MEMORANDUM FOR THE ATTORNEY GENERAL

RE: SPECIAL COVERAGE AT THE REQUEST OF THE WHITE HOUSE

Brigadier General Alexander M. Haig of Dr. Henry Kissinger's staff at the White House, has requested that this special coverage be discontinued.

In accordance with his request, telephone surveillances on the following individuals were discontinued on February 10, 1971:

[redacted] Morton Halperin, [redacted]

Respectfully,

SENT FROM D. O.
TIME 4:54 PM
DATE 2-11-71
BY

John Edgar Hoover
Director

WCS:chs
(ORIGINAL AND YELLOW)

NOTE:

Attorney General previously approved the above telephone surveillances which were installed at the request of the White House. The White House has now requested they be discontinued.

Tolson
Bellmon
Nohr
Bishop
Brennan, C.D.
Callahan
Casper
Conrad
Dalbey
Felt
Gale
Rosen
Tavel
Walters
Soyars
Tele. Room
Holmes
Gandy

MAIL ROOM ☐ TELETYPE UNIT ☐

NOT RECORDED
JUN 12 1973

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DS

Hearings before the Committee on Foreign Relations of the Senate, 93d Cong., 2d Sess. (1974)

PRESIDENT'S MAY 22, 1973 STATEMENT ON WIRETAPS

The Chairman. For the record, I want the record to show that in the May 22, 1973 statement, the President said this, and I quote from that:

> "In order to do this, a special program of wiretaps was instituted in mid-1969 and terminated in February 1971. Fewer than 20 wiretaps, of varying duration, were involved. They produced important leads that made it possible to tighten security of highly sensitive materials. I authorized this entire program. Each individual tap was undertaken in accordance with procedures legal at the time and in accord with longstanding precedent."

[The information referred to follows:]

> [Excerpt from "The Watergate Investigation," Statements by the President. May 22, 1973, *Weekly Compilation of Presidential Documents*, May 28, 1973, Vol. 9, No. 211
>
> Here is the background of these three security operations initiated in my Administration.
>
> * * * * *

1969 WIRETAPS

By mid-1960, my Administration had begun a number of highly sensitive foreign policy initiatives. They were aimed at ending the war in Vietnam, achieving a settlement in the Middle East, limiting nuclear arms and establishing new relationships among the great powers. These involved highly secret diplomacy. They were closely interrelated. Leaks of secret information about any one could endanger all.

Exactly that happened. News accounts appeared in 1969, which were obviously based on leaks—some of them extensive and detailed—by people having access to the most highly classified security materials.

There was no way to carry forward these diplomatic initiatives unless further leaks could be prevented. This required finding the source of the leaks.

In order to do this, a special program of wiretaps was instituted in mid-1969 and terminated in February 1971. Fewer than 20 taps of various duration were involved. They produced important leads that made it possible to tighten the security of highly sensitive materials. I authorized this entire program. Each individual tap was undertaken in accordance with procedures legal at the time and in accord with longstanding precedent.

The persons who were subject to these wiretaps were determined through coordination among the Director of the FBI, my Assistant for National Security Affairs, and the Attorney General. Those wiretapped were selected on the basis of access to the information leaked, material in security files, and evidence that developed as the inquiry proceeded.

Information thus obtained was made available to senior officials responsible for national security matters in order to curtail further leaks.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET. AL., DEFENDANTS.

AFFIDAVIT

City of New York SS:

State of New York

MORTON H. HALPERIN, being duly sworn, deposes and says

1. On May 9, 1969, in Key Biscayne, Florida, defendant Henry A. Kissinger informed me that I was suspected of leaking a story by Mr. William A. Beecher which had appeared in the *New York Times* several days before. The story reported that the United States had begun bombing Cambodia and provided some details of the bombing operation. Kissinger asked me whether I had provided any information to Beecher. I assured him that I had not. I pointed out that I could not have been the source of most of the information in the article since I had not had access to the information and did not know whether the story was accurate or not. Kissinger was well aware of this since everything I knew about the bombing, essential only the single fact that the United States had bombed Cambodia, I had learned in conversation with Kissinger. I had not had and never had access to any documents related to the bombing.

2. Kissinger indicated that he accepted my assurances but that others would not. He noted that as he had informed me previously, a number of high level figures in

the Nixon Administration were suspicious of my political views and considered me disloyal to the administration. He informed me that for a period of time he would not give me access to any of the more sensitive information regarding national security matters. That way, he stated, if any information leaked I could not be blamed.

3. This period lasted until I resigned from the staff of the National Security Council in September of 1969. As of May 9, 1969 I was given no access to sensitive material including information relating to private Vietnam negotiations or negotiations with the People's Republic of China, White House negotiations with the Soviet Union, and plans for troop withdrawals from Vietnam. Kissinger and defendant Alexander Haig were fully aware of this since they personally controlled access to such information.* From May 9, 1969 on, my access was limited to information available to hundreds of others in the White House and the department of the Executive Branch. A number of other officials had access to the information about the bombing of Cambodia and, at least according to press reports, were not tapped. On the National Security Council staff, the members included Henry A. Kissinger, Alexander Haig, and Lawrence Eagleburger. Other officials, unknown to me, in the Departments of State and Defense also had access to this information. Information leaked to the press on other subjects was also available to a number of officials.

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*On one such matter—private Vietnam negotiations—Haig has so testified under oath at the so-called Pentagon Papers trial. He testified: "I would say from the period January '69 until his departure from the staff in August '69 Mr. Haperin had regular access to the regular report traffic on the conduct of the formal negotiations withing the Paris framework which had been established for some period and which was reconvened that year. He would have had some access to those as a member of the staff involved in Southeast Asian and other affairs. He would not have had access to the more sensitive, third-party contacts which may have occurred during that period." (Transcript, p. 10,925.)

4. On August 6, 1969, I informed Kissinger of my desire to leave the National Security Council staff as soon as possible. At his request, my departure was delayed until September 19, 1969. Also at his request I agreed to become a consultant to him.

5. On September 19, 1969 I left the NSC staff and was notified that I had been appointed a consultant effective September 21, 1969.

6. On May 4, 1970, I sent Kissinger a letter resigning as a consultant. On May 13, I received a letter from Kissinger "confirm[ing] that you will no longer be carried on the rolls of the National Security Council staff for possible future consultation."

7. During the period September 20, 1969 to May 13, I had no access to any classified information. This was known to Kissinger and Haig since only they would have given me access. (See also Haig testimony quoted above.)

8. During this period, I was employed by the National Security Council for only one day. On that day I wrote, at Kissinger's request, a memorandum on Vietnam. I had no access to classified information in the course of writing that paper.

9. After leaving the staff of the National Security in the period of September 1967 to February 1971, I engaged in a number of activities reflecting my political beliefs. I wrote articles for newspapers. I consulted with Senators, Congressmen, and their staff on what positions they might take on public issues including Vietnam. In particular, I consulted with a number of people advising Senator Edmund Muskie in connection with his possible candidacy for President of the United States. At the time of the American invasion of Cambodia in the Spring of 1970, I consulted with a number of American citizens about various potential forms of citizen activity to protest American policy. Discussions related to all of these activities took place on my home telephone.

/s/ _____
MORTON H. HALPERIN

Subscribed and sworn to
This 12th day of November, 1973

/s/ _____
LEON FREEDMAN
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1879-72

DANIEL ELLSBERG, ET AL., PLAINTIFFS,

v.

JOHN N. MITCHELL, ET AL., DEFENDANTS.

AFFIDAVIT OF HENRY A. KISSINGER

City of Washington

SS.

District of Columbia

HENRY A. KISSINGER, being duly sworn, deposes and says:

1. I am the Secretary of State of the United States and am also Assistant to the President for National Security Affairs, a position I have held since January 20, 1969.

2. I submit this affidavit in connection with defendants' opposition to the plaintiffs' motion to compel discovery of the defendants in the present action, and specifically for the purpose of providing the Court with a statement of the events pertinent to the electronic surveillance of Dr. Morton H. Halperin, which I understand was instituted by the Federal Bureau of Investigation on May 12, 1969, and terminated on February 10, 1971.

3. The early months of this Administration were particularly sensitive times with regard to the formulation of this country's foreign policies and the establishment of our future relations with other nations. During this period, policies were being considered which would establish the fundamental approach to major foreign policy issues such as the United States' strategic posture, Strategic Arms Limitation Talks (SALT), Vietnam and many other national security issues. Because of the sensitive nature of

these matters, the secrecy of each was of vital importance and the success or failure of each program turned in many instances upon the maintenance of the necessary security. However, notwithstanding the critical need for such security during this period, we were confronted with leaks to the press of information of the greatest improtance to the national security. These leaks included discussions of National Security Council deliberations, intelligence information, negotiating positions and specific military operations. In several cases, significant consequences resulted from these premature releases of internal policy deliberations. In addition, the release of such classified information had obvious benefit for potential enemies of this country. Of particular concern to the President were news leaks which occurred from early April until June of 1969, involving Vietnam policy, strategic arms and the Okinawan reversion.

4. With respect to Vietnam, where the President was determining his broad policy for dealing with the war, both as to negotiating positions and military strategy, news leaks regarding such plans appeared frequently in the press. For example, following a meeting of the National Security Council on March 28, 1969, the President directed that studies be conducted on several subjects associated with a settlement of the war in Vietnam, including a study of alternatives for a unilateral withdrawal. The study directive was issued on April 1, 1969, and within a week thereafter an article appeared in the *New York Times* on April 6, 1969, by Max Frankel revealing that the Government was considering unilateral withdrawal from Vietnam. Similarly, in May of 1969 it was decided that the United States could make an initial troop withdrawal from Vietnam, and shortly thereafter articles appeared by George Sherman in the June 3, 1969, edition of *The Evening Star*, and by Hedrick Smith in the June 4, 1969, *New York Times*, forecasting this decision and announcing that it would be made public following the President's meeting with South Vientam's President Nguyen Van Thieu on Midway Island the following Sunday.

Each of the above disclosures was extremely damaging with respect to this Government's relationship and credibility with its allies. Although the initial troop withdrawal increment was small, the decision was extremely important in that it reflected a fundamental change in United States policy. For the South Vietnamese government to hear publicly of our apparent willingness to consider unilateral withdrawals, without first discussing such an approach with them, raised a serious question as to our reliability and credibility as an ally. Similarly, though in a reverse context, these disclosures likewise impaired our ability to carry on private discussions with the North Vietnamese, because of their concern that negotiations could not, in fact, be conducted in absolute secrecy.

Militarily, a decision was made in early March of 1969 to conduct a series of B-52 bombing raids on North Vietnamese sanctuaries just inside the border of Cambodia. Because of the sensitivity associated with Cambodian neutrality and the tacit support for such action by Cambodia's Prince Norodom Sihanouk, it was extremely important for diplomatic reasons that these raids remain secret and stringent security precautions were taken to ensure that this military operation was not publicly disclosed. Yet notwithstanding all such efforts to maintain the security of this operation, an article appeared in the May 9, 1969, edition of the *New York Times* by William Beecher, attributed to Administration sources, accurately summarizing the conduct of these raids. While there were obvious adverse diplomatic repercussions from this disclosure, its greatest effect was to raise a serious question in the mind of the President as to the ability of the Government to maintain the necessary security required for this and other sensitive military and diplomatic operations, and whether in the future he could make critical foreign policy decisions on the basis of full and frank discussions.

5. Several other examples of critically sensitive press disclosures occurred during this period with regard to the development of our position on strategic arms in preparation for SALT negotiations with the Soviet Union.

First, on January 20, 1969, the President directed that an overall study be conducted on the United States' strategic force posture. A fundamental requirement of this study was to determine what programs should be adopted to ensure the credibility of this country's deterrent capability. The study was conducted and included an analysis of five options to support strategies ranging from emphasis on offensive capabilities at one end, to heavy reliance on anti-ballistic missile systems at the other. Cost estimates for each of the alternative force postures were included. Notwithstanding the obvious need for strict security in the preparation and handling of this report, an article by William Beecher appeared in the *New York Times* on May 1, 1969—prior to consideration of the report by the National Security Council—setting forth an accurate description of the options as well as a close estimate of the range of costs involved.

In addition to the above study, the United States Intelligence Board (USIB), composed of representatives of the intelligence community, had been engaged for several months in an analysis of the Soviet Union's testing of missiles, and in early June of 1969 concluded their review and issued a report, which was extremely closely held, setting forth their estimate of the Soviet Union's strategic strength and possible first strike capability. Because the USIB's assessment varied in its degrees of certainty from earlier statements and reports made by other defense experts in support of the need for the Safeguard ABM System, any public disclosure of the USIB report would provide a useful signal to the Soviet Union as to the disagreement within our Government and the efficacy of our intelligence system. It would also prematurely reveal the intelligence basis on which we were developing our position for the impending strategic arms talks. On June 18, 1969, the fact of the interagency disagreement and opposing agency positions were printed in a *New York Times* article by Peter Grose.

Each of these disclosures was of the most extreme gravity. As presentations of the government's thinking on

these key issues, they provided the Soviet Union with extensive insight as to our approach to the SALT negotiations and severely compromised our assessments of the Soviet Union's missile testing and our apparent inability to accurately assess their exact capabilities. Perhaps more important, evidence of leaks of such closely held intelligence assessments raised serious questions as to the integrity of the USIB and created severe doubts about our ability to maintain security in deliberations on national security policy.

6. Also of serious concern during this period was a press leak involving this country's policy toward Japan and our strategy for negotiations on the reversion of Okinawa. Following a late April meeting of the National Security Council, a National Security Decision Memorandum was issued on May 28, 1969, outlining this country's policy toward Japan, and particularly our negotiating strategy with respect to the reversion of Okinawa. This memorandum set forth our desire to retain nuclear weapons on Okinawa but stated, as a fallback position, that we would be prepared to consider the withdrawal of these weapons while retaining the storage and transit rights. Shortly after this memorandum was completed, and prior to the negotiations with the Japanese, an article by Hedrick Smith appeared in the *New York Times* on June 3, 1969, stating that the President had decided to remove nuclear weapons from Okinawa once an overall plan to return the Island had been agreed upon. The article noted that the President's decision had not yet been communicated formally to the Japanese Government. The consequences of this disclosure, attributed to well-placed informants, in terms of compromising negotiating tactics, prejudicing the Government's interest, and complicating our relations with Japan were obvious, and clearly preempted any opportunity we might have had for obtaining a more favorable outcome during our negotiations with the Japanese.

7. In early May, 1969, after the first several unauthorized disclosures of classified information had occurred, the President consulted the then Director of the Federal

Bureau of Investigation, J. Edgar Hoover, and the then Attorney General of the United States, John N. Mitchell, concerning methods to be employed to deal with the problem. The President was told by Mr. Hoover that the most effective method was that which had been followed in previous Administrations, namely the conduct of electronic surveillance in accordance with specific procedures. The President was assured by Attorney General Mitchell that such action would be in compliance with law.

My office was required by the President to submit the names of those officials who had had access to the information which had been leaked. Obviously, my office was a natural place for this information to exist; and Dr. Halperin, in his position as Chief of the National Security Council Planning Group, was unquestionably one of several persons who had had access to such information.

8. As a result of this position, which he held until September 30, 1969, and as a consultant to the National Security Council until May 13, 1970, Dr. Halperin received extensive exposure to classified information, much of which remains confidential to this day.

Dr. Halperin was involved in the organization, substantive preparation and processing of National Security Council policy reviews, and his assignments gave him access to the fundamental policy issues during the formative and crucial early months of 1969. During the period from January until May 1969, Dr. Halperin regularly participated, in conjunction with the responsible staff area specialists, in sensitive National Security Council studies. In addition, he also frequently attended National Security Council Review Group Meetings, which I chaired, and which considered a variety of subjects, including the United States strategic posture, strategic arms negotiations, Vietnam, the Middle East and United States trade policies, to name only a few. Dr. Halperin also participated in the preparation of papers for the President's use at meetings with the National Security Council covering a wide range of issues. While performing the above responsibilities, Dr. Halperin devoted particular attention to

several specialty areas, including the United States' strategic posture, the SALT negotiations and the war in Vietnam. To maintain his currency in each of these areas, Dr. Halperin regularly received cables to and from our Embassies, including limited distribution cables on Vietnam and the Paris negotiations, as well as daily intelligence reports and sensitive intelligence publications.

9. Dr. Halperin's name and the names of other individuals were provided to the Federal Bureau of Investigation for their investigation. On May 13, 1969, I received a letter from Director Hoover indicating that on the basis of independent information available to him, it appeared probable that recent leaks had come "from a staff member such as Morton H. Halperin of the National Security Council." Director Hoover further stated specifically that "we should not ignore the possibility that Halperin . . . could be the source of a leak" and that he therefore had alerted the Bureau's most sensitive sources (i.e., electronic surveillance).

10. However, notwithstanding the investigation of Dr. Halperin and others being conducted by the Federal Bureau of Investigation, and additional governmental efforts to curb the unauthorized disclosure of classified information, press leaks involving Southeast Asia, SALT, the Middle East, NATO and other national security matters continued through 1969, 1970 and 1971. Such disclosures necessitated issuing a memorandum on May 23, 1970, to several government agencies regarding the SALT negotiations, in which I stated that:

> Vital national interests are being jeopardized by leaks to the press concerning the strategic arms limitation talks. No one in the Government is authorized to devulge the United States or Soviet positions to the press or to speculate concerning United States' intentions with respect to the negotiations.
>
> The President has directed that immediate steps be taken to ensure that standing directives concerning leaks are adhered to without exception by personnel under our jurisdictions. Prompt and severe disciplinary action is to be taken in the event of violations.

Throughout this period, leaks of information which could have serious adverse effects upon our national security and our relations with our allies continued.

11. From the commencement of the electronic surveillance of Dr. Halperin in May of 1969 until May, 1970, I was provided periodic summaries of the information gained from this surveillance of his conversations which the Federal Bureau of Investigation determined to involve national security. However, in late May 1970, it was decided that such reports would be directed to the office of Mr. H. R. Haldeman, then an Assistant to the President, and that Mr. Haldeman would advise the President, General Haig, then an assistant on my staff, or myself, of information that required our attention. In addition, an informal liaison was maintained between Mr. Sullivan of the Federal Bureau of Investigations and General Haig of my staff, and if the surveillance of Dr. Halperin developed information of sufficient gravity, Mr. Sullivan would call General Haig and either inform him of that fact or call his attention to the fact that a report containing that information had been sent to Mr. Haldeman. I remember only one such event, but there may have been others.

/s/ _____

HENRY A. KISSINGER

Subscribed and sworn to before me this 26th day of November, 1973.

/s/ _____

JOHN JOSPEH RATELFORD
Notary Public

My Commission expires May 31, 1979.

EXCERPTS FROM PLAINTIFFS' ANSWERS TO FEDERAL DEFENDANTS' FIRST SET OF INTERROGATORIES.

Their contacts with foreign nationals were of a strictly professional personal and social character. The details of such contacts are irrelevant to this litigation.

Question 36.

The observations in the first paragraph of the plaintiffs' response to question 35 apply here also.

Again, in fact, and without conceding the propriety of the question, plaintiffs made certain social and professional trips to foreign countries during the period January 1969 through February 10, 1971. None of those trips involved any contacts with foreign agents or agencies that were in any sense collaborative.

Question 37.

Each plaintiff claims damages from each defendant under 18 U.S.C. section 2520 for all days from May 9, 1969 through February 10, 1971, inclusive, and for each date thereafter on which there was a use or disclosure of contents of their conversations. Depositions of C & P employee Hampton and F.B.I. special agent Belter and the answers of the federal defendants and C & P Telephone Company establish that the electronic equipment and personnel used to intercept and monitor their telephone conversations was installed and operating during the entire period May 9, 1969, through February 10, inclusive. F.B.I. agents Belter and Barnhardt testified in deposition the F.B.I. logs are not a complete record of all conversations overheard. Nevertheless, because the logs are records of an unknown portion of plaintiffs' intercepted conversations, plaintiffs have prepared a chart summarizing certain information reflected in the logs. Plaintiffs will make the chart available for inspection by counsel for the federal and other defendants. Because the chart reflects identifications given by the FBI to persons overheard on plaintiffs' telephone were not parties to this case, plaintiffs

believe the chart is within the terms of the protective order.

For each of the 638 conversations whose substance purports to have been recorded in whole or in part, the chart indicates the identity of the parties as reflected in the logs, whether the record content in whole or in part in quotations, and other notations, such as "no pertinent activity." The chart indicates that Morton Halperin was party to 359 (56%) of the calls recorded in the logs, of which 173 (27%) were conversations between plaintiffs Morton and Halperin and 182 (26%) were between Morton Halperin and persons not parties to this lawsuit. Two hundred seventy-two (43%) were conversations between Ina Halperin and persons not parties to this lawsuit. Morton Halperin was overheard on 253 separate dates; Ina Halperin was overheard on 263 separate dates. David, Mark, and Gary Halperin were each overheard in at least one conversation recorded in the logs where they are specifically identified.

As to post-February 10, 1971 uses and disclosures, such use and disclosure clearly took place on various dates in June–August 1971 in connection with the removal of the logs from the FBI to the White House and the Pentagon Papers investigation, on February 25, 1973 in a conversation between Mr. Nixon and John Dean, and in various press statements in May–June 1973 and thereafter, some purportedly anonymous, on the results of the tap. Plaintiffs have sought additional documents from Mr. Nixon and the federal defendants relevant to post-termination use of the taps and are continuing discovery (from Mr. Nixon and Mr. Kissinger especially) as to this issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

FEDERAL DEFENDANTS' STATEMENT OF MATERIAL FACTS

Come now the Federal defendants, by their undersigned attorney and pursuant to Local Rule 1-9(g), Rules of the United States District Court for the District of Columbia, and in support of Federal Defendants' Motion for Summary Judgment, hereby state the following to be material facts as to which there is not genuine issue:

1. Richard M. Nixon was President of the United States from January 21, 1969 to August 9, 1974. John N. Mitchell was Attorney General of the United States from January 21, 1969 to March 2, 1972. Henry A. Kissinger was President Nixon's National Security Adviser from January 20, 1969 to August 9, 1974. J. Edgar Hoover was Director of the Federal Bureau of Investigation from May 10, 1924 until May 2, 1972. H. R. Haldeman was Assistant to the President from January 21, 1969 to April 30, 1973. General Alexander Haig was assigned in January 1969 from the Military Academy to the White House to aid in organizing the National Security Council staff, where he remained until October 1974. William C. Sullivan was in charge of the Domestic Intelligence Division, Federal Bureau of Investigation, from June 1961 to August 1970 and subsequently was Assistant to the Director until October 1971. Robert C. Mardian was an Assistant Attorney General in charge of the Internal Security Division, United States Department of Justice, from November 12, 1970 to

April 26, 1972. Clarence M. Kelley is the Director of the Federal Bureau of Investigation, a position which he has held since July 9, 1973.

2. During the early months of the Nixon Administration, it was determined that new direction should be taken with regard to the United States' foreign policies, particularly in Vietnam, China, the Soviet Union, the Mid-East and Europe. In order to effect the new foreign policies, President Nixon re-established the National Security Council (NSC) and appointed Dr. Henry Kissinger as his National Security Advisor. [Nixon Dep. at 10–13, 38–39.]

3. Because of the sensitivity of many aspects of the new foreign policies, the President and his National Security Advisor believed that secrecy of consideration and decision on these matters was imperative. [Kissinger Res. at 1.]

4. There was concern that because the NSC staff members had access to information about these highly sensitive foreign policy initiatives that such information could be "leaked." [Nixon Dep. at 12–14.] Leaks of information occurred from early 1969 through 1971. [Kissinger Res. at 10–13; Kissinger Affidavit, *Ellsberg* v. *Mitchell* C.A. 1879–72 (Def. Exb. 1).] The leaks included information from the National Security Council. [Kissinger Res. at 10–13, Nixon Dep. at 16–17.]

5. The President and Dr. Kissinger, his National Security Advisor, believed these disclosures were severely damaging to the planning and conduct of foreign affairs initiatives needed to protect the national security. [Def. Exb. 1, Kissinger Res. at 2; Nixon Dep. at 22, 28–29 45–51, 101–02.]

6. The President discussed the problem of unauthorized disclosure with, among others, Dr. Kissinger; John Mitchell, Attorney General and J. Edgar Hoover, Director of the Federal Bureau of Investigation. The discussions were an effort to determine how to find who was leaking and to take appropriate steps to stop the leaks. [Nixon Dep. at

15, 19-22, 25-26; Kissinger Res. at 1-3, 17-19; Kissinger Dep. at 21-29; Mitchell Dep. at 19-26.]

7. During the course of these discussions the President was advised by Director Hoover that the installation of electronic surveillance was the most effective method of determing the sources of leaks. [Nixon Dep. at 19-26; Mitchell Dep. at 20-21; Kissinger Res. at 18.]

8. The President requested the Attorney General's opinion as to the President's powers to authorize electronic surveillance. Pursuant to 28 U.S.C. § 511, the Attorney General rendered his opinion that electronic surveillance for national security purposes did not require judicial authorization. [Nixon Dep. at 20, 84; Mitchell Dep. at 76-79; 81-83, 84-85, 95; Kissinger Res. at 7, 18.]

9. At the time the Attorney General rendered his legal opinion, the Supreme Court had expressly reserved ruling on the issue of whether electronic surveillances conducted for national security purposes required judicial authorization [*Katz* v. *United States*, 389 U.S. 347, 358 n. 23 (1967)]. Mr. Justice White had suggested that the Court should not require the warrant procedure and the magistrate's judgment and that a surveillance would be constitutional ". . . if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security electronic surveillance as reasonable" [*Katz* v. *United States*, *supra*, at 364 (White, J. concurring)].

10. Additionally, prior to the decision of the Supreme Court in *United States* v. *United States District Court*, 407 U.S. 297 (1972) *(Keith)*, the Attorney General had taken the legal position that the exemption of national security surveillance in 18 U.S.C. § 2511(3) from the strictures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C. §§ 2510-20] constituted congressional confirmation and authorization of the President's powers under Article II of the Constitution to authorize electronic surveillance for national security purposes without first obtaining judicial authorization. [Mitchell Affidavit, Def. Exb. 11.]

11. Further, at the time the surveillance at bar was active, seven Federal courts ruling on the issue of whether the President required judicial authorization to conduct electronic surveillance for national security purposes had held no authorization was required. [*United States* v. *Clay*, Criminal No. 67-H-94 (S.D. Tex., July 14, 1969) (quoted in *Brown, infra); United States* v. *Stone*, 305 F. Supp. 75 (D.D.C. 1969); *United States* v. *O'Baugh*, 304 F. Supp. 767 (D.D.C. 1969); *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill., Feb. 20, 1970) (Def. Exb. 9); *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. 1970) *United States* v. *Butenko*, 318 F. Supp. 316 (D. N.J. 1970); *United States* v. *O'Neal*, No. KC CR 1204 (D. Kan. Sept. 1, 1970) (Def. Exb. 10).] The only court to rule to the contrary involved a domestic security electronic surveillance, which the court distinguished from surveillance prompted by foreign affairs concerns; and even that decision did not come until approximately a month before the surveillance at bar was discontinued. [*United States* v. *Smith*, 321 F. Supp. 424 (C.D. Cal. 1971).]

12. In affirming the constitutionality of warrantless national security electronic surveillance, the above-cited courts also found that such surveillances were exempted from the standards and procedures of Title III by 18 U.S.C. § 2511(3). And in *United States* v. *Smith, supra*, at 425, the Central District of California held that the domestic security surveillance there was not subject to Title III's warrant standards and procedures, even though the Court held that type of surveillance required judicial authorization under the Fourth Amendment.

13. Further discussion as set forth in 5–8, *supra*, established a criteria for determination of individuals who would be subjects to such electronic surveillance to determine the source of leaks and to stop the leaks. It was decided that subjects would be taken from among (1) those who had access to information which had leaked; (2) those who had unfavorable information in their security files; and (3) those whose names appeared as sources or recipients of leaked information in Federal Bureau of Investi-

gation investigations. [Nixon Dep. at 24, 61; Kissinger Res. at 18; Kissinger Dep. at 28, 62; Mitchell Dep. at 21-22.]

14. It was also determined that Dr. Kissinger would provide Director Hoover with names of those persons who had access to leaked information. [Kissinger Res. at 8, 9; Kissinger Dep. at 31; Nixon Dep. at 24, 85; Mitchell Dep. at 25.]

15. The program of surveillance was to be activated in the event further leaks of information bearing on foreign affairs necessitated a security investigation. [Kissinger Dep. at 42.]

16. The program was activated, at the direction of the President on May 9, 1969 when the *New York Times* published an article by William Beecher revealing the American bombing of North Vietnamese occupied territory in Cambodia. This leak was regarded by the President and Dr. Kissinger as extremely detrimental to the United States. [Nixon Dep. at 22.]

17. Among those persons initially designated as subjects for electronic surveillance was Morton H. Halperin. Halperin was a member of the National Security Council staff from January 21, 1969 to September 20, 1969, and was a consultant to the Council until May 13, 1970. [Halperin Dep. at 20-21, 118-19.] Halperin fit the criteria established since he had access to information which had been leaked and because his security files contained certain unfavorable information. [Kissinger Dep. at 47-49; Kissinger Res. at 23; Def. Exb. 1; Nixon Dep. at 34-35; Mitchell Dep. at 21-22; Ash Affidavit, Def. Exb. 2.]

18. Electronic surveillance was placed on the home telephone of Morton Halperin on May 9, 1969. [Federal defendants' Answer to Second Amended Complaint, ¶ 22.]

19. Because of the sensitivity of the program, that is, ascertaining the identity or identities of those in high councils of government leaking information affecting the national security, efforts were made to handle the program with a minimum of paper which could similarly be

the subject of leaks to avoid chilling discussions within the government as well as inhibiting discussion with foreign leaders. [Haig Dep. at 12; Nixon Dep. at 21.] The Federal Bureau of Investigation was urged to maintain all information emanating from the surveillance on a "need to know" basis. Director Hoover decided one master copy of the logs and summaries of the log material would be prepared. [Sullivan Dep. at 42-43.]

20. The President relied on Director Hoover for the conduct of the investigation, "he being an expert in this field." [Nixon Dep. at 59, 89.]

21. The summaries of the log material were prepared, in major part, by Bernard Wells, an employee of the Federal Bureau of Investigation, for review of Federal defendant William C. Sullivan Assistant to the Director in charge of the Domestic Intelligence Division, Federal Bureau of Investigation, and final approval and signature of Director Hoover. (Hoover, in some instances, prepared the summaries himself.) [Sullivan Dep. at 72-74.] The summaries were directed, in letter form, to Dr. Kissinger and to President Nixon. [Sullivan Dep. at 42-43, 83-85; Sullivan Dep., Pl. Exb. 13; Haig Dep. at 41-45.]

22. Because leaks of classified information affecting our national security continued through 1969, 1970 and 1971, investigative effort by the Federal Bureau of Investigation continued throughout this period. [Def. Exb. 1, ¶10.]

23. The knowledge which Halperin had obtained through his employment in the National Security Council with respect to foreign affairs did not lose its significance when Halperin left his full-time position with the National Security Council staff in September 1969 and his consultant position in May 1970. [Def. Exb. 1, ¶11; Kissinger Res. at 27; Kissinger Dep. at 86; Nixon Dep. at 54, 116, 123.] Additionally, Halperin had taken, without authority, several boxes of official, classified documents from the Department of Defense and the National Security Council after he terminated employment, thereby retaining access to sensitive foreign affairs information. (Halperin Dep. at 64-68, 70, 84-85, 94-99.]

24. On February 10, 1971, the telephone surveillance on the Halperins' home telephone was terminated. [Haig Dep. at 118–119, Pl. Ex. 22; Mitchell Dep. at 68.]

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

PLAINTIFFS' STATEMENT OF GENUINE ISSUES IN RESPONSE TO FEDERAL DEFENDANTS' STATEMENT OF MATERIAL FACTS*

1. Insofar as they are relevant and relate to the time period involved in this litigation the facts in this paragraph are not disputed.

2. This is an accurate summary of defendant Nixon's deposition testimony on this subject.

3. Plaintiffs do not dispute that Nixon and Kissinger believed in 1969 that secrecy was necessary. They note that Kissinger has since testified that:

> "First, when one is new in government, leaks take on an extraordinary significance, because one has a sort of a tendency to think that a top secret paper is inviolate, and when one suddenly sees the essence of it in the newspaper there is usually a rather strong reaction. I have talked to members of previous administrations who have described their similar reactions to me.
>
> One has to be candid. This is sometimes out of proportion to the intrinsic damage that this particular leak may do, looked at in the long view. But it tends to have an effect on confidence. (Dr. Kissinger's Role in Wiretapping Hearings, Senate Committee on Foreign Relations, 93rd Cong., 2nd Sess. 1974 (hereinafter Kissinger Wiretap Hearings) 323.)

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*Responses are keyed to paragraph numbers of Federal Defendants' Statement.

4. Plaintiffs' submit that a genuine issue exists with respect to these facts insofar as they are not consistent with the following:

A. Most members of the NSC staff including plaintiff Morton Halperin did not have access to the sensitive information related to the new initiatives described in paragraph 2. As regards secret Vietnam negotiations defendant Haig has testified to Halperin's lack of access.

B. Leaks occurred not only in the period 1969 to 1971 but both before and after. Of the leaks which occurred in the 1969 to 1971 period, as listed in Kissinger's Response to Interrogatory 9, only two stories, one relating to troop withdrawals from Vietnam and the other to the shoot-down of the EC 121, were from documents that were very closely held. Morton Halperin had no access to the troop withdrawal information. Halperin affidavit July 15, 1976.

C. Much of the information which leaked was in National Security Council documents but such documents are circulated widely in the Departments whose heads are on the NSC—State, Defense, Joint Chiefs, and CIA—and the same information was in most cases included in many Departmental documents. Halperin affidavits November 12, 1973 and July 15, 1976.

5. Plaintiffs concede that Nixon and Kissinger wanted to keep such information about their plans and intentions secret. Since the time in question, Kissinger has somewhat changed his view about the national security importance of maintaining secrecy. (See ¶ 3 *supra*). The fear of leaks was also related to the fact that senior adminsitration officials were often not informed of actions taken by Kissinger and Nixon and they feared that leaks would embarass them with these officials, including Secretary of State William Rogers:

> . . . re [another tapee] K[issinger] said wasn't really Cambodia, was domestic P[resident] th[in]ks there's more to this than appears. What really is situation of this guy. Closest confident.
>
> Why did he really leave?

Haig-K-I [Haldeman] meet tomorrow. Then to P Weds. [deleted] could expose Paris—Would destroy Admin. internally.

K has to work out way to tell Rogers re Paris so if this comes out say channels open if we ever want to use. Also have to disclose K's secret channel otherwise might embarass P [R?] and force him to resign vs. P.

[deleted] knows if he can bust K out he could cause great disruption.

Also figure [deleted] told Harriman & Harriman w[ou]ld break it.

Notes by Haldeman of conversation with Nixon 1/4/71.

6. Plaintiffs do not contest that there were discussions of leaks and how to stop them.

7. Plaintiffs do not dispute that the defendants so testified. There is, however, a genuine issue as to the accuracy of the testimony: Mr. Hoover is dead and there is no contemporaneous written record of his making the statement attributed to him. Nixon told Dean that wiretapping was always unproductive, which tends to reduce the credibility of his current statement that Hoover told him it was the most effective method. According to the Report of the Senate Select Committee on Intelligence, FBI records "reveal no case in which the source of any leak was discovered by means of electronic surveillance." Report S. 11, 94th Cong., 2d Sess. Tape of February 28, 1973 meeting between John Dean and Mr. Nixon. Exhibits to Federal Defendants Motion for Summary Judgment, Exhibit 13, at 103 (cited as Def. Ex. No. and page).

8. Plaintiffs submit that there is a genuine issue whether such an "opinion" was given, or if given, its scope. Neither the request to the Attorney General nor his response was in writing. Mr. Mitchell's affidavit suggests the mental formation of a conclusion, not the rendition of a formal legal opinion. The request was not based on a precise question as required by 5 U.S.C. §511, as interpreted by the Attorney General. In any event, the Attorney Gen-

eral's "opinion" and, indeed, the question of legality of wiretaps were apparently based on the assumption that existing FBI procedures would be followed, so the "opinion" was limited to the question of whether a warrant was required and did not address the question of what other procedures might be necessary to make the surveillance legal. Mitchell in a memorandum of May 6, 1969 to Hoover had laid out some of these procedures; they were not followed for this series of taps. Plaintiffs' Statement of Material Facts 18 (hereinafter Plaintiffs' Facts). Nixon Deposition at 26, 58, 59.

9. Plaintiffs incorporate by reference the discussion of this matter in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motions for Summary Judgment Against the Individual Defendants (hereinafter Plaintiffs' Memorandum) at 55–59 and submit that a genuine dispute exists insofar as defendants' statement is inconsistent with that discussion. In particular, they note that the Supreme Court in *Katz* clearly established by 1967 that the reasonableness standard of the Fourth Amendment—embodied in "other safeguards"—applied to all taps including those conducted on national security grounds. See Plaintiffs' Memorandum at 22.

10. Plaintiffs submit that a genuine dispute exists as to the facts stated here insofar as they are inconsistent with the following: Plaintiffs are not aware of any written internal FBI or Department of Justice document or public statements by the Attorney General discussing the legality of a warrantless surveillance directed at an American citizen not believed to be an agent of a foreign power for the ostensible purpose of tracking down the source of leaks, and were given no such document in response to Rule 34 requests that would have covered one had it existed. The speeches of the Attorney General included in Defendants' Exhibits describe the scope of warrantless national security surveillances to "combatting foreign-directed espionage and subvision" and meeting the threat of "domestic subversion" [Def. Ex. 11 at 72–73]. Section 2511(3) on which the Attorney General purports to have

relied does not encompass surveillances to discover the source of leaks. Furthermore plaintiffs submit that, as a factual matter, the executive branch precedents referred to are not relevant since most of the warrantless surveillances took place prior to the *Katz* decision [*Katz v. United States*, 389 U.S. 347 (1967)] and all of those conducted to track down leaks went on in 1965 or earlier and before the Supreme Court held in *Katz* that phone conversations were covered by the Fourth Amendment. Neither the Mitchell affidavit nor his speeches suggest that the Fourth Amendment standards other than the warrant were not applicable to all national security surveillances. In fact, the Attorney General stated the contrary: "It is not claimed that the President is exempt from the provisions of the Fourth Amendment, or that his discretion is unbridled." [Def. Exh. 11 at 79]. Def. Exhs. 11, 12, 13, 14.

11. Plaintiffs submit that a genuine issue exists as to these facts insofar as they are inconsistent with the following: In two of the seven cases cited by the defendants, the court held that since the wiretaps occurred prior to the Supreme Court decision in *Katz* the Fourth Amendment issue did not arise. These two cases involved no judgment of the Presidential power to conduct warrantless wiretaps which are covered by the Fourth Amendment. *United States v. Stone*, 305 F. Supp. 75 (D.D.C. 1969) and *United States v. O'Bragh*, 304 F. Supp. 767 (D.D.C. 1969). The other five cases involved surveillances conducted "solely for the purpose of gathering foreign intelligence" and were apparently directed at embasaries or similar facilities. None were directed at American citizens. In the one case involving a surveillance of an American citizen, the court held the surveillance illegal *United States v. Smith*, 321 F. Supp. 424 (C.D. Col. 1971). None of these decisions addressed the question of what procedures other than a warrant were constitutionally required, and all the taps in question presumably complied with applicable FBI regulations, as the Halperin tap did not. Plaintiffs also incorporate by reference Plaintiffs' Memorandum at 57–58.

12. Plaintiffs dispute these "facts", which are actually legal arguments. Plaintiffs' view of what the cases show

about constitutionality of these surveillances is discussed in ¶11 *supra*. As to the application of the standards of Title III, most of the cases do not discuss Title III standards at all *(Dillinger, Stone, O'Baugh, O'Neal)*. The others refer to section 2511(3) in various ways but none makes the sweeping holding described by defendants. Moreover none hold that procedures similar to Title III are not constitutionally required nor that the Title III sanctions procedures would not apply to illegal "national security surveillance".

13. Plaintiffs concede that these are the criteria described by defendants. They note that the third criterion is inapplicable to Halperin by definition and they dispute the contention that the other criteria was in fact used to select Morton Halperin to be tapped or that he fit them. See Plaintiffs' Memorandum of Points and Authorities in Opposition to Federal Defendants' Motion for Summary Judgment, §I(B)(1) (hereinafter "Pl. Opp. Mem."). Pl. Mem. 23–26.

14. Plaintiffs submit that a genuine dispute exists as to this statement. On May 9, 1969 Nixon instructed Kissinger to "inform Mr. Hoover of any names that he considered prime suspects." Nixon Deposition at 23, 35. They note that the statement is in the passive and does not indicate who gave the instructions or what Kissinger did in response.

15. Plaintiffs do not dispute this assertion, as to time of initiation, but note that no "security investigation" accompanied the Halperin tap. In addition, plaintiffs submit that a genuine issue exists as to the purpose of initiation and continuation of the tap. See Pl. Opp. Mem. §I(B).

16. Plaintiffs dispute this paragraph to the extent, that it is inconsistent with Plaintiffs' Facts ¶5–9. They note that the only contact between the White House and the FBI in the period May 9–12 in the record of this case was between Kissinger and Hoover at their level and Haig and Sullivan at theirs. Thus if the program was activated by the President on May 9 that directive must have been transmitted either by Kissinger or by Haig acting at his

direction. Nixon did not direct surveillance of any particular person and specifically did not direct the surveillance of Morton Halperin (Nixon Deposition at 34, 36).

17. Plaintiffs dispute the facts in this paragraph insofar as they are inconsistent with the facts stated in Plaintiffs' Facts Paras. 5–9. Kissinger selected Halperin for surveillance by directing Haig to bring his name to Sullivan. Halperin did not meet the criteria for surveillance since he had no information in his file which suggested a propensity to leak nor any adverse information which Kissinger considered significant, and since he had no greater access to information that leaked than many others on and off the NSC staff. See Pl. Opp. Mem. §I(B); Pl. Mem. 25.

18. Plaintiffs do not dispute this fact. They incorporate by reference the facts listed in Plaintiffs' Facts of ¶11–19. They note that the Attorney General did not authorize any surveillance until three days later.

19. Plaintiffs dispute these facts insofar as they purport to explain the motivation for departure from normal FBI procedures. It is their position that there is substantial evidence to support an inference that the departure from normal procedures was based on defendants awareness of the impropriety of their actions, as reflected in the fear that Hoover would blackmail Nixon. See Pl. Opp. Mem. §I(B)(3). The FBI was instructed to keep no records and limit FBI distribution but there was distribution of the letters in the White House, for example, to members of Ehrlichman and Haldeman's staff, a fact that undermining the "security" rationale. Plaintiffs' Facts ¶18–25, 62–65.

20. Plaintiffs dispute this fact. There was no FBI investigation. The FBI viewed itself as performing a service for the White House. It simply put on taps requested by Kissinger, continued them at his direction, and removed them at his direction. No distribution of the information occurred in the Bureau and normal files and records were not maintained. Distribution and use took place in the White House. *Ibid.*; Sullivan Deposition at 89; Jones Deposition at 32.

21. Plaintiffs dispute these facts insofar as they are inconsistent with the following. Sullivan instructed Wells to prepare summaries and to put his initials on them. Certain summaries were addressed to Mitchell as well as Nixon and Kissinger. After May 1970 letters were addressed to Haldeman. Plaintiffs' Facts 23. Sullivan Deposition at 73.

22. Plaintiffs dispute these facts as regards the plaintiff Morton Halperin. The FBI conducted no investigation at all after May 9 when it questioned some informants. The FBI simply conducted a wiretap at the request of the White House and supplied summaries. Nor can the continuation of the wiretap be related to continuing leaks. No defendant in his deposition offered this rationale. Kissinger, whose affidavit is cited for this assertion, claims to have had no role in deciding what surveillances were to be continued. This rationale cannot explain why the Halperin surveillance continued while others were removed. Moreover, most if not all of the material which leaked after Spetember 1969 was information as to which Halperin did not have access. Sullivan Deposition at 89. Jones Deposition at 32; Halperin affidavit July 16, 1976.

23. Plaintiffs concede that some of the knowledge that Halperin had did not loose its significance between September 1969 and February 1971 but contend that much of it did. For example, Halperin's knowledge of administration plans for Vietnam and SALT quickly became out of date. Halperin in any case did not provide anyone any classified information. Plaintiffs specifically dispute the facts in the second sentence of the paragraph. They dispute the relevance of the episode since none of the defendants appear to have been aware of it and it thus could not have served as a justification for the continuation of the surveillance. In any case Halperin did not ship or send any material without authority. His access to the material was dependent on his maintaining a security clearance. Halperin affidavit July 19, 1976; Halperin Dep. at 61, 64–68, 70, 72–76, 84–86.

24. Plaintiffs do not contest the date of termination. They incorporate by reference their Statement of Facts as

they relate to the period between when the surveillance ended and its revelation in May 1973. Plaintiffs Facts 52–72.

Respectfully submitted,

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JULY 19, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187–73

MORTON H. HALPERIN, ET AL., PLAINTIFF,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

PLAINTIFFS' STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE I–19(h)

Plaintiffs, by their attorneys, hereby set forth, pursuant to Local Rule I–9(h), the following facts in support of their motion for summary judgment against the individual defendants as to which there is no genuine issue:

1. From May 9, 1969 until February 10, 1971 the FBI intercepted and monitored all of the telephone conversations on the home telephone of the plaintiffs. Federal Defendants Kissinger, Haig, Sullivan, and Kelley Answer to Second Amended Complaint (hereinafter "Fed. Def. Answer"), para. 24. Belter Deposition, p. 57.

2. No warrant was obtained to authorize this wiretap. Fed. Def. Answer, Para. 20.

3. Plaintiffs were not during this period nor at any time prior to or after this period agents of a foreign power, nor have they ever acted under the direction and control or in collaboration with a foreign power. Second Amended Complaint, para. 39; Fed. Def. Answer para. 39; Nixon Answer to Second Amended Complaint, para. 19; Mitchell Answer to Second Amended Complaint, para. 39; Haldeman Answers to Second Amended Complaint, para. 39.

4. At no time prior to or during the period of the surveillance did any of the defendants believe that the plaintiff Morton Halperin or the other plaintiffs were in fact agents of foreign powers. *Ibid.*; Memorandum Hoover to Mitchell, May 12, 1969.

5. On May 9 or 10, 1969, Kissinger asked defendant Haig to prepare a list of those who had access to the information in a New York Times story published on May 9, 1969, related to the bombing of Cambodia. Haig prepared such a list, which did not include the name of plaintiff Morton Halperin, and transmitted it to Kissinger. Haig Deposition, p. 143.

7. On May 9 or 10, 1969, Kissinger gave Haig the names of Morton Halperin, Helmut Sonnenfeldt and Daniel Davidson of his staff, and Robert Pursley, military assistant to the Secretary of Defense, and instructed him to bring those names to defendant William Sullivan and request a wiretap of each of them. Haig Deposition, p. 135; Memorandum Sullivan to DeLoach, May 11, 1969, Minority Memorandum on Facts and Law, House Judiciary Committee, 93rd Cong., 2nd, July 22, 1974, p. 62.

8. All three members of Kissinger's staff on the list Kissinger gave to Haig were described by Kissinger as individuals whom all of his associates had urged him not to hire. Kissinger Deposition, p. 36. Kissinger's Response to Interrogatories, Response 21.

9. On May 10, 1969, Haig brought the four names including that of Halperin to Sullivan and requested wiretaps. He instructed Sullivan that no records were to be maintained. Memorandum Sullivan to DeLoach, May 11, 1969.

10. During the meeting on May 10 Sullivan and Haig agreed on the procedures to be followed in the conduct of the wiretaps. Sullivan Deposition, p. 42; Haig Deposition, p. 23.

11. On May 11, 1969, Sullivan caused to be written a memorandum for Hoover (through DeLoach) describing Haig's conveyance of Kissinger's request for wiretaps on Halperin and three others, and attached a memorandum to be sent from Hoover to the Attorney General seeking his approval of the wiretaps. *Ibid.;* Memorandum Hoover to Mitchell, May 12, 1969.

12. On May 12, 1969, Hoover sent the memorandum to the Attorney General which Sullivan had caused to be drafted. The description of Morton Halperin in the memorandum read in full as follows:

> Halperin, aged 30, was detailed from the Department of Defense to the National Security Council as a senior staff member on January 21, 1969. He was the subject of an applicant-type investigation by this Bureau. While admittedly he has had contact with Soviet nationals the investigation did not disclose at that time any pertinent derogatory information. Memorandum Hoover to Mitchell, May 12, 1969.

13. On May 12, 1969, at 5:48 p.m. defendant John Mitchell signed the memorandum, thereby approving the surveillance of the Halperin home telephone. *Ibid.*; FBI Memo May 12, 1969.

14. On May 12, 1969, Sullivan instructed Special Agent Courtland Jones of the FBI Washington Office to install a wiretap on the home telephone of Morton Halperin at 8215 Stone Trail Drive, Bethesda, Maryland. *Ibid.*; Jones Deposition, p. 6.

15. Sullivan did not inform Jones of the purpose of the surveillance and did not tell him that it related to a possible leak. He gave Jones no instructions then or at any subsequent date to minimize the interceptions in any way. He instructed only that no records were to be kept in the Bureau relating to the interceptions. Jones Deposition, pp. 7, 14, 26.

16. On May 13, 1969, at 4:55 p.m. the first telephone conversation on the Halperin home telephone was monitored after the approval of the wiretap by the Attorney General. Previous interceptions had taken place from May 9, 1969 at 6:20 p.m. to May 11, 1969 at 9:24 p.m. Surveillance logs.

17. From May 13, 1969 to February 10, 1972, the wiretap was continuously in place on the Halperin home telephone. All calls were listened to and there was no effort to minimize the interceptions. Belter Deposition 38, 43, 57; Sullivan Deposition, p. 131.

18. The Halperin surveillance was not initiated or conducted under the normal procedure of the FBI and the Department of Justice in effect in and after May 1969 with respect to national security wiretaps including, at a minimum:

(a) a statement in the initial application to the Attorney General of

(i) the activities the subject was engaged in and the type of information which it was anticipated would be obtained through the wiretap;

(ii) the period of time for which approval was requested; and

(iii) whether it was reasonably anticipated that the conversations of any other person would be overheard.

(b) a limitation of the period of initial authorization to 90 days, and a continuous 90 day reauthorization requirement;

(c) a description in each 90 day application for renewal of the type of information which had been obtained from the wiretap;

(d) maintenance of complete FBI records pertaining to all aspects of the wiretap, including authorization, renewal and termination records, logs, summaries and records of dissemination;

(e) numbering and initialling of logs by FBI monitors;

(f) indexing of all FBI records pertaining to the wiretap into the appropriate FBI indexes, including the indexing of names of persons overheard on the tap in the FBI's Electronic Surveillance ("Elsur") Index;

(g) minimization of the interception and reporting of privileged communications, conservations of third parties and other conversations outside the original purpose of the wiretap;

(h) preservation for at least ten years of the tape records of intercepted conversations; and

(i) prohibition against the dissemination of records or other information pertaining to the wiretap to persons other than those involved in the authorization or conduct of the tap, and a requirement that informa-

tion originating from the tap be clearly identified as such prior to dissemination. Memorandum Mitchell to Hoover, May 6, 1969; Mitchell Deposition, p. 14; Belter Deposition, p. 63; Jones Deposition, p. 24.

19. Agents of the FBI prepared logs of some of the conversations, including many that were not pertinent to the subject of leaks, some of which were intended merely so that there would be an entry for the day. Belter Deposition, pp. 39, 40, 91; Haig Deposition, p. 38; Nixon Deposition, pp. 133-35; Haldeman Deposition, p. 56; Kissinger Deposition, p. 1.

20. The logs were forwarded to Sullivan who would read them, mark some portions and call Haig to come and read them. Sullivan Deposition, pp. 80, 252; Jones Deposition, p. 25.

21. Haig from time to time came to Sullivan's office and read the logs. Sullivan Deposition, p. 80; Letter Sullivan to Hoover, May 20, 1969.

22. On at least one occasion (May 20, 1969), Kissinger came to Sullivan's office and read some logs. Letter Sullivan to Hoover, May 20, 1969.

23. Beginning on or about May 26, 1969, Sullivan on instructions from Hoover caused to have written letters summarizing some of the information obtained from the wiretap. When the letters were prepared (addressed to Kissinger and Nixon from Hoover) Sullivan would forward them to Hoover with the recommendation that Hoover sign them and send them to the White House. Memorandum Sullivan to DeLoach May 28, 1969 and various dates thereafter.

24. After Hoover signed the letters, they were sent to the White House and delivered to Haig or his secretary who would hold them unopened for him. Such letters were sent on the following dates: May 28, 1969, August 1, 1969, August 13, 1969, August 22, 1969, Sept. 3, 1969, Sept. 30, 1969, Oct. 9, 1969, Oct. 24, 1969, Nov. 7, 1969, Dec. 29, 1969, Dec. 31, 1969, May 4, 1970, May 8, 1970, and May 11, 1970. Haig Deposition, p. 43. Letters Hoover to Nixon and Kissinger on dates indicated.

25. Haig would open the copy of the letter addressed to Kissinger, read it and then send it on to Kissinger. Haig Deposition, p. 43.

26. Kissinger would read some but perhaps not all of the letters and return them to Haig. Haig Deposition, pp. 43-45.

27. Haig would forward the copy addressed to Nixon to defendant Ehrlichman's office. Haig Deposition, p. 57.

28. The letters would be opened by Ehrlichman's secretary, read by his assistant Todd Hullin and then sent to Egil Krogh of his staff according to instructions Ehrlichman had given for the distribution of letters from FBI Director Hoover. At least some of the letters including those of September 3 and 1969, Nov. 7, 1969, and May 8, 1970, and May 11, 1970 were either filed in Ehrlichman's office or copies were made and filed in his office. Ehrlichman Deposition, pp. 7-8, Hullin Deposition, pp. 5, 7. Letter R. Stan Mortenson to Walter Slocombe, June 28, 1976.

29. Defendants Haig, Haldeman, Ehrlichman, Kissinger and Nixon would from time to time discuss the contents of conversations intercepted from the Halperin phone and the utility of the surveillance and whether it should be continued. Haig Deposition, p. 43; Haldeman Deposition, p. 43, 55; Nixon Deposition, p. 135; Memorandum Haig to Kissinger, June 4, 1969.

30. From time to time Sullivan caused to be prepared summaries of the interceptions which were then sent to Mitchell. Such summaries were sent on at least the following dates: August 6, 1969; December 29, 1969 and May 4, 1970.

31. In December 1969 Morton Halperin was in telephone contact with Leslie Gelb with whom he was working in assisting former Secretary of Defense Clark Clifford who was writing an article relating to American policy in Vietnan. Halperin discussed with Gelb an outline of points Clifford might make in such an article, and steps Clifford might take to insure a broad audience for his views. Upon

learning of the interceptioon of this conversation, defendant Sullivan transmitted information about the conversation to Kissinger, Mitchell and Nixon, through J. Edgar Hoover. This information was subsequently further transmitted by Haig to Ehrlichman who transmitted it to Haldeman who transmitted it to Jeb Stuart Magruder, who in turn transmitted it to Alexander Butterfield, then a deputy assistant to the President, early in January, 1970. At Ehrlichman's suggestion, Haldeman instructed Magruder, than a special assistant to the President, to use the information to work on planning answers to the criticisms of the Administration's Vietnam policy which the intercepted conversations revealed would be made in the Clifford article. In various communications to White House staff members in January, 1970, defendants Haldeman and Ehrlichman suggested ways in which to answer the article once it appeared and to attempt to discredit its author. Letter from Hoover to Nixon, December 29, 1969; Memorandum from "E" to "H"; Memorandum from "H" to "M"; Memorandum from Butterfield to Magruder, January 8, 1970; Memorandum from Keogh to Magruder, January 12, 1970; Memorandum from Magruder to Haldeman and Ehrlichman, January 15, 1970.

32. In a note Ehrlichman characterized as follows the information derived from the interceptions" "This is the kind of early warning we need more—your game planners are now in an excellent position to map anticipatory action." After reading Ehrlichman's note, Haldeman wrote: "I agree with John's point. Let's get going." Handwritten memorandum from "E" [Ehrlichman] to "H" [Haldeman], undated; Memorandum from "H" [Haldeman] to "M" [Magruder].

33. On or about May 12, 1970 there was prepared within the FBI from the logs under the control and supervision of Sullivan a memorandum entitled, "Sensitive Technical Coverage at Request of the White House." The memorandum summarized a number of conversations overheard on the wiretap of plaintiffs' home telephone and included logs of those conversations. The memorandum prepared for

Hoover noted that "since the President's announcement on April 30, 1970 of the invasion of Cambodia, we have received considerable information from these installations," including the one on plaintiffs' phone. The memorandum summarized the information from the wiretap on plaintiff's phone as follows:

> We learned through these sources that Halperin, who was serving as a consultant to the National Security Council, planned to resign to protest the invasion of Cambodia. He subsequently did resign. During conversations with other individuals Halperin indicated that he feels the President intends to attack North Vietnam and Laos and agreed to work with Senator Fullbright (D-Arkansas) in opposing the war. Halperin also stated he had contacted Kuntsler, who may be identical with William Kuntsler, the attorney for the individuals recently convicted for violation of the antiriot laws at Chicago, Illinois. Kuntsler allegedly is willing to join an "organization" being formed by Halperin and other individuals.

FBI Memo May 12, 1970.

34. On May 12, 1970 Nixon, Hoover and Haldeman met to discuss the wiretap program. Hoover supplied the information from his brief. Nixon instructed Hoover thenceforth to direct his summary letters reporting on the wiretap interceptions only to Haldeman. Haldeman was instructed by the President to screen the letters and pass pertinent ones on to him and to Haig for Kissinger. *Ibid.*, Memorandum DeLoach to Sullivan May 13, 1970; Memo Haynes to Sullivan, May 15, 1970; Haldeman Deposition, p. 49.

35. From May 12, 1970 until February 10, 1971 the following letters summarizing interceptions of plaintiffs' phone were delivered to Haldeman's office. May 14, 1970, May 18, 1970, May 21, 1970, May 26, 1970, May 29, 1970, June 2, 1970, June 9, 1970, June 11, 1970, June 15, 1970, June 19, 1970, June 23, 1970, Oct. 14, 1970, Nov. 13, 1970, May 24, 1970, Dec. 17, 1970, Dec. 10, 1970. Letters Hoover to Haldeman, dates indicated.

36. The letters sent to Haldeman contained a substantial amount of information related to the lawful political activity of the plaintiffs. As reported in the letters these included:

> Morton H. Halperin, a former member of the White House staff who is now employed by the Brookings Institution and who recently resigned as a consultant to the National Security Council as a protest against the war in Cambodia, told his wife that he was disappointed that so few people have congratulated him on his resignation as a consultant. He said that on next Monday he was going to Cambridge, Massachusetts, to discuss his forthcoming book with some professions. He also said that he had signed a petition against the war. He subsequently stated that he had signed a letter to "The New York Times" from "Military Strategist." He said it was incredible that "they" could only get five individuals to sign the letter. He mentioned that Senator Tydings had jointed his "group." Letter Hoover to Haldeman May 14, 1970.

> Morton H. Halperin, a former member of the White House staff who recently resigned as consultant to the National Security Council as a protest against the invasion of Cambodia stated in reply to a question concerning his antiwar activities "its just a group of concerned citizens" who are being financed by the Council for a Livable World. He said that the group included Dan Ellsburg (phonetic) of Rand Corporation; an individual at Cornell University who has the Southeast Asian program; an individual from Michigan State University; and an individual from Brookings Institution. He said that he had attempted to set up a national organization but it was hopeless. He told the individual to whom he was speaking to watch the newspaper for a real blast on the war by former Secretary of Defense.

> Halperin mentioned that he had received a copy of Senator Edmund Muskie's resolution on the war and that Muskie had read the resolution to Clifford, probably in reference to Clark Clifford, former Secretary of Defense.

Halperin was subsequently in contact with Mike Brewer (phonetic) of the Ripon Society. Brewer asked Halperin's assistance in lobbying for antiwar resolutions which will be introduced in Congress. He wanted Halperin to talk to the "middle group" of congressmen who are not committed. Brewer told Halperin he planned to talk to the Executive Director of the Producers Council, which includes representatives of basic industries, such as U.S. Steel, to get their support for the resolutions. Halperin agreed to help and told Brewer to "try to push this Clifford article when it comes out." Letter *Ibid.* May 18, 1970.

Morton H. Halperin, a former member of the White House staff who recently resigned as a consultant to the National Security Council as a protest over the invasion of Cambodia, was in contact with Jim Johnson (phonetic). Johnson stated that he was one of the directors of the lobbying effort for the "McGovern-Hatfield thing what we call operation 'purse strings.'" Halperin agreed to meet with Johnson. Letter *Ibid.* May 26, 1970.

Morton H. Halperin, an employee of the Brookings Institution who recently resigned as consultant to the National Security Council, during a conversation stated that Mathias, probably identical to Senator Charles McC. Mathias, had talked to Mansfield, probably identical to Senator Mike Mansfield, concerning a meeting. Halperin said "we are now talking about the weekend of the 19th and 20th." Subsequently, Halperin sent the first half of an article to Dr. Leslie Gelb of the Brookings Institution. Gelb described it as "the Muskie thing." Gelb stated that he and Halperin will meet with Muskie, probably identical to Senator Edmund S. Muskie, on Wednesday, June 3, 1970. Letter *Ibid.* June 2, 1970.

Morton H. Halperin indicated that Senator Frank Church was attempting to contact him. He also stated that he had recently been in Cambridge, Massachusetts, where he had talked with other individuals about the war in Vietnam. Halperin and these individuals are to have another meeting at an unindicated date. Halperin was also to attend the meeting

called by an official of the Ripon Society. Letter *Ibid.* June 9, 1970.

Morton H. Halperin, who recently resigned from the National Security council, recently contacted the Urban Coalition and dictated a paragraph which he said Mr. Gardner had requested. Gardner is probably identical with John Gardner, the former Secretary of the Department of Health, Education and Welfare, who now heads the Urban Coalition. Halperin dictated the following paragraph to Mr. Gardner's secretary. "Withdrawal of all American forces from Vietnam within eighteen months. Negotiation of an agreement with the Soviet Union ending the nuclear arms race. Reduction of defense spending. Increased foreign aid and continued U.S. involvement in the world consistent with real American interest and domestic needs." Letter *Ibid.* June 11, 1970.

Morton H. Halperin, who recently resigned from the National Security Council as a protest against the invasion of Cambodia, was contacted by Howard Gilette (phonetic). who is apparently connected with Project Purse Strings, a group formed to support "peace" candidates in forthcoming elections. Halperin, at Gilette's request, agreed to talk to the "top people" in the offices of Senators Norris Cotton and James B. Pearson on the war in Cambodia. Gilette described Senator Cotton as "marginal" on the Church-Cooper amendment but said that Halperin's talk could make Senator Pearson favor the amendment. Letter *Ibid.* June 23, 1970.

Halperin was in contact with Gelb concerning the President's peace proposals. Halperin said that under these proposals the United States can give unlimited support to the Cambodians, the South Vietnamese and the Laotians. In answer to a question by Gelb, Halperin said he was writing a paper on the President's speech which he intended to give Max Frankel of "The New York Times" to use as he desired. He also said that he was writing a newspaper article on Vietnam. Letter *Ibid.* Oct. 14, 1970.

Morton Halperin, a former member of the National Security Council staff, was in contact with Leslie

Gelb. Both Halperin and Gelb are employed at the Brookings Institution, Washington, D.C. Gelb stated he thinks United States Senator Kennedy will run for President in 1972. He cited as his reasons the fact that Kennedy's acceptance speech was addressed to a larger audience than the people of Massachusetts, that Kennedy was not ready to discuss NATO and that relatives and friends of Kennedy have said Kennedy was only waiting on the Massachusetts vote before making his decision. Gelb added that unless United States Senator Muskie did not run against Kennedy, President Nixon will win in 1972. Halperin did not agree with this last statement. Gelb also mentioned he had met with Muskie prior to Muskie's recent appearance on television. Others in attendance or commitment were McPhearson, Fernnard, Valenti, Burnke, Cohen and Sahire. All of the above names are phonetic.

Halperin and Gelb also discussed a meeting which may take place this week to advise Senator Muskie concerning "China policy." They discussed the fact that Nichols, Warnke, Barnett, Halperin, Tony Lake, Reed Perkins and Owenberg may participate in the meeting. Lake is probably identical with William Anthony Lake, a former member of the National Security Council staff. Letter *Ibid.* Nov. 13, 1970.

Halperin was subsequently in contact with Leslie Gelb of the Brookings Institution. Gelb discussed a forthcoming trip by Senator Edmund Muskie to Russia and said Muskie was making the trip recommended by Clifford, probably referring to former Secretary of Defense. He also mentioned that Averell Harriman was going with Muskie. Letter *Ibid.* Dec. 17, 1970.

Morton Halperin, a former member of the National Security Council, was in contact with Leslie Gelb of the Brookings Institution. Gelb told Halperin that Senator Edmund Muskie was to hold a meeting at 5 p.m., December 30, 1970, in Clifford's office concerning Secretary of Defense Clark Clifford. Letter *Ibid.* Dec. 30, 1970.

Morton Halperin, a former employee of the National Security Council staff who is now connected with the Brookings Institution, was contacted by Lowell Beck of Common Cause which is led by John Gardner. Beck said Gardner was interested in getting Halperin's thought on the Cambodian situation which Halperin agreed to furnish. Halperin said the Administration has geared itself to save Cambodia and may have to save Laos. He said the real issue is "what can you try to get Congress to do." Beck and Halperin agreed to focus on a resolution that Congress will buy.

Beck said Gardner is giving a speech before the Ripon Society in New York on February 1, 1971. Both Beck and Halperin agreed the speech should "give a hint we are starting to move on the Cambodian question." Letter *Ibid.* Jan. 29, 1971.

37. Throughout the period of the wiretap defendants Kissinger, Haig, Halderman, Nixon and Sullivan were aware of the fact that no information was being obtained relative to leaks and that much information that was not pertinent was being gathered. Sullivan recommended removal of the wiretap but did not order his subordinates who were conducting the surveillance and who were responsive to his orders to discontinue it. The other defendants either took no action or ordered the surveillance continued. Haig Deposition, pp. 38, 50, 66; Haldeman Deposition, pp. 43, 56; Kissinger Deposition, pp. 73, 74, 76, 88, 97; Nixon Deposition, pp. 133, 135.

38. On May 15, 1969 Sullivan informed DeLoach that no information related to leaks to the *New York Times* or elsewhere had been discovered. Memorandum Sullivan to DeLoach, May 15, 1969.

39. In the same memorandum Sullivan informed DeLoach that he would notify the Director immediately if the source of a leak was ever discovered. No such notice concerning the Halperin wiretap was ever sent. *Ibid.*

40. On May 20, 1969 Kissinger visited Sullivan's office and told him that he wanted the surveillance on Halperin

continued "for a while longer." Letter Sullivan to Hoover, May 20, 1969.

41. On June 4, 1969 Haig prepared "talking points" for Kissinger for a meeting Kissinger was to have with Hoover. They read in pertinent part as follows:

> 1. Express your appreciation to Mr. Hoover and Mr. Sullivan for their outstanding support in recent weeks in uncovering security problems within the NSC staff. Inform Mr. Hoover that you have discussed these problems in detail with the President (and with Messrs. Haldeman and Ehrlichman).
>
> 3. Ask Mr. Hoover for his views on how we should proceed with Halperin, who has been involved in indiscretions and who obviously has a reputation for liberal views but who has yet to be firmly linked with a security breech. I think it best that you seek Mr. Hoover's advice in this instance while avoiding any specific comments pro or con and especially avoiding any opinions on this matter.
>
> 5. Ask Mr. Hoover if he has any additional information or guidance which he feels would be useful in this very difficult situation. Specifically you might inquire about requirements for prolonging the taps, making it clear that the President wishes to terminate them as soon as possible. (I think in the case of Halperin and that they should be kept on for at least another two weeks so that a pattern of innocence can be firmly established.) Memorandum Haig to Kissinger, June 4, 1969.

42. On June 4, 1969 Kissinger met with Hoover and talked to him along the lines of the talking points prepared by Haig. *Ibid.* Kissinger Deposition, p. 71.

43. On June 20, 1969 Sullivan wrote to DeLoach that "there has been nothing of late relevant to the leaks" and that Haig had agreed to discontinue some of the surveillances, but not the wiretap on Halperin. Memorandum Sullivan to DeLoach, June 20, 1969.

44. On July 8, 1969 Sullivan wrote to Hoover that "nothing has come to light of significance from the standpoint of the leak in question" and suggested that

"some of this coverage" be removed. He stated his "guess" that Halperin assumes his phone is tapped. Letter Sullivan to Hoover July 3, 1969.

43. On September 15, 1969, Kissinger told Haig to instruct the FBI to discontinue all of the surveillances except those on Halperin and one other. This was done, Memorandum Sullivan to DeLoach, Sept. 15, 1969.

46. On September 19, 1969 Halperin left the NSC staff over the objections of Haig and Kissinger who urged him to remain and not because of anything overheard on the wiretap of his phone. Kissinger offered to resume Halperin's full access to sensitive information if he stayed and asked him to become a consultant if he left. Kisinger Deposition, p. 59; Kissinger Answer to Interrogatories, p. 59; Haig Deposition, p. 66.

47. There is no evidence in the record that there was any review of the legality, necessity or propriety of continuing the surveillance at this time.

43. From September 19, 1969 to May 8, 1970 Halperin served as a consultant on the NSC staff. He worked only one day and had no access to classified information. Halperin affidavit, Nov. 12, 1973, para. 7, 8.

49. On May 4, 1970 Halperin resigned as a consultant to the NSC. *Ibid.*, para. 6.

50. There is no evidence to indicate that any review was made of the propriety, legality or necessity for continuing the surveillance at this time.

51. On July 12, 1970 Jones sent a note to Sullivan noting that the Halperin tap had not produced anything "of value" suggesting its removal. Memorandum Jones to Sullivan July 12, 1970.

52. On February 10, 1971 Sullivan received Hoover's permission to inquire of Haig if any of the surveillances could be discontinued. Memorandum Sullivan to Tolson, Feb. 10, 1971.

53. On February 10, 1971 Sullivan inquired of Haig who requested the removal of all the surveillances. Memorandum Hoover to Mitchell, Feb. 11, 1971.

54. On February 10, 1971 Sullivan ordered the removal of the Halperin wiretap and so informed the Attorney General through Hoover. *Ibid.*

55. On February 10, 1971, the wiretap was removed. *Ibid.*

56. On June 15, 1971 a blind memorandum was prepared, evidently in the FBI and in connection with the investigation concerning publication of the Pentagon Papers, reporting conversations from the Halperin wiretap. FBI Memorandum, June 15, 1971.

57. During the course of their work, the White House "plumbers" were given access to the files of the Halperin wiretap and at least one letter reporting a conversation from the wiretap was put in the plumber's files. Ehrlichman Deposition, p. 79.

58. On June 17, 1971, Kissinger drew upon information he had learned from the Halperin wiretap in a discussion concerning Daniel Ellsberg at a White House meeting. Ehrlichman Deposition, pp. 67–69. Ehrlichman handwritten notes of June 17, 1971 meeting.

59. On July 2, 1971, the Justice Department asked the FBI if Daniel Ellsberg had been overheard on any electronic surveillance. Despite the fact that Ellsberg had been overheard at least 11 times on the Halperin wiretap, the FBI informed the Justice Department on July 13 that Ellsberg had never been overheard. Memorandum Mardian to Hoover July 2, 1971; Memorandum Hoover to Mardian July 13, 1971. Surveillance logs and letters.

60. On July 9, 1971, the Justice Department asked the FBI if Morton Halperin had ever been the subject of an electronic surveillance. Memorandum FBI to Justice July 16, 1971.

61. On July 16, 1971, the FBI informed the Justice Department that Halperin had never been the subject of a surveillance. Sullivan approved the sending of this memorandum. *Ibid.*

62. In June 1971 Sullivan, who then had custody of the documents pertaining to the Halperin wiretap, contacted

defendant Mardian and informed him that he did not believe the wiretap documents could safely be left in the FBI after his departure. Mardian then consulted Mtichell about the disposition of the documents, and was thereafter summoned to San Clemente to discuss the matter with Nixon and Ehrlichman. Fed. Def. Ans. to Second Amended Complaint, D. 30. Sullivan Deposition, pp. 173–89; Nixon Dep. 143–49; Ehrlichman Dep. 40–45; Mitchell Dep. 73–76; Mardian FBI interview (Form 302).

58. On July 10, 1971, two days prior to Mardian's arrival, Nixon and Ehrlichman discussed the ongoing investigation of the publication of the Pentagon Papers, during the course of which Ehrlichman made the following note: "Re Grand Jury—Don't worry re taps on discovery—re WITS". Daniel Ellsberg, who had been overheard approximately fifteen times on the Halperin wiretap was the prime subject of the Pentagon Papers investigation and Halperin's name had been mentioned as possibly involved. Ehrlichman Dep. 69–73; Ehrlichman notes dated 7/10/71; Nixon Dep. 140–43; Haldeman Dep. 83–84; Blind Memorandum "Re: Morton Halperin 6/15/71"; Memorandum Mardian to FBI Director July 2, 1971.

64. On July 12, 1971, Mardian met with Nixon and Ehrlichman and discussed both the disposition of the wiretap documents and the progress of the Pentagon Papers investigation. At this meeting Mardian stated, according to Nixon, that the tap program could become a "hot issue" and informed Nixon and Ehrlichman that the documents were not properly filed in the FBI and that Sullivan believed they could not safely remain there after he left. Nixon then instructed Mardian to obtain the documents from Sullivan. Ehrlichman's notes of this meeting state: "P[resident]—OK obtain and destroy all logs". With respect to the summary letters sent to the White House, Ehrlichman's notes state: "Haig return docs to FBI then to RM for destruction. Haig request the FBI (Sullivan) to destroy all special coverage. Sullivan will contact Mardian". Nixon Dep. 144–49; Ehrlichman Dep.

73–75; Mardian FBI interview (Form 302) Ehrlichman notes (7/12/71).

65. Some time after the July 12 meeting at San Clemente Nixon instructed Ehrlichman to take possession of the documents from Mardian and to place them in a safe in Ehrlichman's White House Office. These instructions were carried out and the documents remained in Ehrlichman's safe for the next 21 months. Nixon Dep. 148–49; Ehrlichman Dep. 45–56; Fed. Def. Ans. to Second Amended Complaint ¶30; Mardian FBI interview (Form 302).

66. In July 1971 the FBI incorrectly informed the Justice Department that there had been no wiretap of Morton Halperin. Memorandum Director FBI to Assistant Attorney General, Internal Security Division, July 16, 1971.

67. After indictment of Daniel Ellsberg in June 1971, Ellsberg and his counsel were repeatedly told in response to wiretap discovery requests that Ellsberg had not been overheard on any FBI wiretap. In May 1973, the trial judge in *United States v. Ellsberg and Russo*, No. 9373 (W.M.B.)—(C.D. Cal.), was informed that Halperin and Ellsberg had in fact been overheard but that the records of the tap were missing from the FBI. Although Nixon, Ehrlichman and Mardian knew that the records were secreted in Ehrlichman's safe, they withheld this information from the FBI, the Justice Department, and the trial judge in the Ellsberg case, who dismissed the prosecution when the government failed to produce the records. Memorandum Mardian to FBI Director, July 2, 1971; Memorandum FBI Director to Assistant Attorney General, July 13, 1971; Ehrlichman Dep. 52–56, 84–85; Nixon Dep. 153–62; Mardian FBI Interview (Form 302).

68. In February 1973, *Time* Magazine informed the White House and the Justice Department that it had been advised of a program to conduct electronic surveillance of White House officials and newsmen. On the instructions of the President, both the White House and the Justice Department falsely denied the story. Nixon Dep. 149–52.

69. On February 28, 1973, Nixon and John Dean had a conversation in which Nixon was informed by Dean of the "stonewalling," *i.e.*, false denial, of the *Time* story and answered, "Oh absolutely." The tape of the meeting reveals that Nixon was then aware that Halperin had been under surveillance and that the Halperin tap had revealed nothing useful. Tape of February 28, 1970 meeting between John Dean and the President.

70. In March 1973, at the confirmation hearings of L. Patrick Gray to be Director of the FBI, Gray was asked whether the FBI had conducted the wiretap described in the *Time* story, and answered that the FBI did not have records reflecting the existence of such a tap. Nixon, who knew that the FBI records were incomplete because of his orders to hide the records in the White House, did not intervene to order Gray or any other official to advise the Committee of the facts. Nixon Dep. 152–55.

71. The existence of the wiretap program first became known to the plaintiffs on May 10, 1973, when the trial judge in the Ellsberg case ordered the release of a memorandum filed with the court on May 9, 1973, by William D. Ruckelshaus, Acting Director of the Federal Bureau of Investigation. The memorandum stated in pertinent part:

> A preliminary report which I received last night indicates that an F.B.I. employee recalls that in late 1969 and early 1970 Mr. Ellsberg had been overheard talking from the electronic surveillance of Dr. Morton Halperin's residence. It is this employee's recollection that the surveillance was of Dr. Halperin, and that Mr. Ellsberg was then a guest of Dr. Halperin.
>
> I have no information concerning the substance of the conversation, nor has the investigation to date been able to find any record of such a conversation. The investigation, of course, is not complete, and further facts bearing upon the wiretaps may be uncovered. Ruckelshaus Deposition at p. 6.

27. On or about May 11, 1973, Ruckelshaus recovered the Halperin wiretap records from Ehrlichman's safe and

returned them to the FBI. (Ruckelshaus Deposition, pp. 63–64.)

Respectfully submitted,

/s/ _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187–73

MORTON H. HALPERIN, ET AL., PLAINTIFF

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS

Federal defendants, by their attorneys, hereby set forth, pursuant to Local Rule 1–9(h), the following response to Plaintiffs' Statement of Material Facts:

1. Federal defendants do not disagree with the facts contained in plaintiffs' Facts 1, 2, 3, 4, (plaintiffs have no Fact numbered 6), 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 41, 42, 44, 46, 47, 50, 52, 53, 54, 55, 56, 59, 60, 61, 62, 58 (sic), 64, 65, 66 and 27 (sic).

2. Federal defendants dispute the accuracy of the "facts" contained in 5, 7, 17, 22, 36, 37, 40, 43, 45, 48, 51, 57, 58, 67, 68, 69, 70 and 71. Federal defendants submit the documents and materials upon which plaintiffs purport to rely and the entire record in this matter speak for themselves.

3. However, while Federal defendants do not disagree with the plaintiffs' "facts", except as specifically enumerated in paragraph 2, *supra*, they do disagree with the characterizations which plaintiffs' have sought to give those facts.

4. Further, Federal defendants disagree with plaintiffs' assertion that all of the "facts" which they enumerate are material to the resolution of this action by summary judgment.

5. Finally, Federal defendants rely on their Statement of Material Facts as inclusive of all facts necessary for the Court to resolve this action. *See* Federal defendants' Statement of Material Facts, filed July 9, 1976.

6. Notwithstanding the foregoing, the remaining facts contained in plaintiffs' Statement constitute an adequate basis for this Court to reach and decide the pending Cross-Motions for Summary Judgment, pursuant to Rule 56, F.R. Civ. Pro.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

AFFIDAVIT OF MORTON H. HALPERIN

1. I am a plaintiff in the above-captioned litigation. This affidavit is submitted in connection with Plaintiff's Response to Federal Defendants' Motion for Summary Judgments.

2. I have reviewed all of the summary letters of telephone conversations provided to the plaintiffs. None of the letters in my judgment contains any information which was classified at the time of the conversation.

3. The letters do contain a great deal of discussion about foreign policy since that was the field in which I was working and writing at the time but none of the information discussed was classified.

4. After I left the National Security Council staff in September 1969, I felt free to speculate on the motives and views of the North Vietnamese government as well as those of senior U.S. government officials. Such speculation was not based on access to current government information and did not involve the circulation of classified information.

6. After leaving the government I met frequently with American and foreign journalists. Often journalists would call and say that Dr. Kissinger or a member of his staff had suggested that they talk to me about the NSC staff and how it worked. In other cases the journalists wanted

to discuss the substance of foreign policy issues, and I would do so to the extent that I could without revealing classified information. In no conversation with journalists did I reveal such information.

7. Leaks of classified information occurred both prior to May 1969 and after February 1971.

8. With the exception of the stories related to troop withdrawals from Vietnam and the EC-121 shootdown, none of the leaks described by Kissinger in his Response to Interrogatory 9 appear to involve material related to major Presidential initiatives which were being very tightly held.

9. National Security Council documents were circulated widely within the Department of State and Defense and in the CIA.

10. Leaks which occurred after September 1969 as identified in Kissinger's affidavit (Def. Ex. 1) involved material to which I did not have access.

11. Much of the information relating to the NSC which I learned from January to September, 1969, was greatly reduced in value after the end of 1969 because it was out of date.

/s/ _____
MORTON H. HALPERIN

Sworn and subscribed to before me this ___ day of July, 1976

/s/_____
Notary Public
District of Columbia

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

MEMORANDUM ON HALPERIN SECURITY FILE INFORMATION AND RESULTS OF THE TAP

The only two items in any of Halperin's security files that can in any way be said to be adverse are contained in his Department of Defense file and are reported in memoranda of July 10 and August 1, 1968 (attached as Exhibits A and B to this memorandum).[1]

One of the items concerned the omission from a security form submitted on August 17, 1966, of travel to Greece, Yugoslavia and the U.S.S.R., as part of a round-the-world trip lasting from September 1963 to September 1964.[2] As Halperin explained to the security officers of the FBI and Department of Defense who questioned him about this matter, the countries had been omitted inadvertently by his secretary in typing the security form. The form itself provided only a very small space to list the countries visited and others were to be listed on a continuation sheet.

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[1] Memorandum for the record subject: HALPERIN, MORTON H. by William H. Quinlan, Jr., July 10, 1968; Memorandum for file subject: Halperin, Morton H. by John S. Rice, Jr., August 1, 1968. In his response to Interrogatory 18 Kissinger identifies these two items as the only ones that "might be regarded as unfavorable."

[2] Personnel Security Form dated August 17, 1966. See items 12 and its continuation in item 20.

In moving from the form to the continuation sheet, the secretary inadvertently skipped 4 countries in typing a long list.[1] This is shown in Exhibit C.

Halperin had made no effort to conceal this trip having listed the countries on his passport application and on other security clearance forms and having volunteered the information to the FBI in June of 1968.[2] This information was in Halperin's FBI file.[3] When in August of 1968 Halperin explained the omission to the Department of Defense security officials, they asked Halperin to prepare a new personnel history which he did.[4] Halperin's Department of Defense file does not show that any further action was taken on this matter.

The other item listed in Halperin's Defense Department security file relates to a Department of Defense requirement that all contacts with Soviet nationals be reported. There is no suggestion that Halperin did not adhere scrupulously to this rule. Halperin filed a memorandum on November 8, 1967 reporting his contacts with two Soviet officials on the previous day; on January 3, 1968 he filed a memorandum reporting a lunch on December 29, 1967 (Exhibits D and E). When visited by DOD security officers in July of 1968 and shown pictures of various Russian officials, Halperin informed the security officers that his memorandum of January 3, 1968 had identified the wrong Russian as the person with whom he had lunch. Halperin provided the correct name in the interview. He did not

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[1] Memorandum for file August 1, 1968. Halperin Deposition at 22-25. FBI memorandum of June 18 [year deleted but apparently 1968] reporting FBI interview with Morton H. Halperin on June 20.

[2] *Ibid.*; Memorandum subject Halperin, Morton H. by Jay F. Myers, July 18, 1968.

[3] FBI memorandum February 20, 1969 re Morton H. Halperin.

[4] Personnel Security Form dated August 13, 1968.

subsequently submit a written memorandum correcting the error.[1]

It is this failure to correct the written record on the correct identity of the Russian that led a DOD Security officer to note that Halperin "appears to have a carefree attitude concerning his obligations under AI-64 in that he did not advise the Security Division of his error in identification of who he had lunch with on 29 December 1967".[2]

As the federal defendants note in their brief "where access to such highly sensitive information is involved, doubts are resolved in the form of the Government."[3] In this case there were evidently no doubts since Halperin's Top Security Clearance was continued in effect and he was granted a series of additional clearances of great sensitivity including, on August 29, 1968, one month after his interview with DOD security officers, a "SIOP-E SI" clearance for access to the nation's most secret plans for strategic nuclear war,[4] and a clearance which can be described on an unclassified basis only as one relating to

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[1] Memorandum July 10, 1968.

[2] The Defendants' Memorandum uses this quotation in a way which appears to suggest that the judgment regarding a "carefree attitude" was that of the NSC security officer in 1969 and that it related to "the reporting of security information." Fed. Def. Memo. at 10. As we show below, Mr. Ash reached no such conclusion.

[3] Fed. Def. Mem. at 39. The memorandum cites *Clifford v. Shoultz*, 413 F.2d 868 (9th Cir. 1969). There an individual with a clearance declined to answer questions about problems raised in a security investigation. The court sustained the government's right to take away his clearance. In the Halperin case Dr. Halperin answered all the questions asked, evidently to the satisfaction of the security officers since not only was his clearance not lifted, but as discussed *infra*, he was granted additional and highly sensitive clearances.

[4] DOD SIOP-ESI Access Certificate signed by Morton H. Halperin September 18, 1968 and noting access approved August 29, 1968. Exhibit F.

"military space programs." These clearances remained in effect until Halperin resigned in September 1969.[1]

In January of 1969 when Halperin went to work on the NSC staff, the Security Officer of the NSC Russell Ash requested a copy of Halperin's Defense Department file and asked the FBI to conduct an investigation of Halperin. The DOD file arrived first. Ash in his affidavit states that with respect to Halperin and two others "there was adverse information of record which I felt should be brought to his [Kissinger's] attention; and that specifically there was information which had been of concern to the security officers of the Federal agencies from which they were being detailed. That I further advised Dr. Kissinger that any serious doubts about the issuance of security clearance to these three individuals should be reached in favor of the government and clearance denied."[2]

Kissinger turned Halperin's file over to Haig for review and to determine if he and others were "victims of overly zealous criteria." Haig testified later "in each instance I came to that conclusion and I told him so." Haig recommended that Kissinger overrule whatever concerns were

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[1] These special clearances were transferred to the National Security Council and were not cancelled until Halperin voluntarily resigned as a consultant September 19, 1969. DOD Memorandum subject: Morton H. Halperin (Security Clearance information) no date in Halperin DOD Security file. Memorandum Ash to David Whitehill Central Intelligence Agency Subject: Transfer of Accountability for Special Type Clearances, January 30, 1969; Memorandum Knolt, Chief, Special Security Center to Russell Ash subject: Transfer of Accountability for Special Clearances, March 6, 1969. Exhibits G, H and I.

[2] Ash Affidavit October 1, 1975. Contrary to Kissinger and Haig's assertions, Kissinger Response to Interrogatories at 20, Haig Deposition at 29, Ash carefully does not state that he ever recommended against hiring Morton Halperin.

expressed and hire Dr. Halperin.[1] Kissinger shared Haig's judgment that "overly zealous criteria" were being used and after discussing the matter with Haig authorized Halperin's Top Secret Clearance.[2] In his testimony before the Senate Foreign Relations Committee, after indicating that he had not read Halperin's security file, Kissinger erroneously described the incidents discussed here, as involving falsifying a passport application and not reporting a previous trip to Russia on a passport application. He went on to explain:

> In the case of Halperin, I thought that given the many travels he took it was an understandable lapse that he would forget to put down every last trip that he had taken over the requisite period.[3]

Kissinger, the official best in a position to judge the significance of the two incidents, has not changed his view about their insignificance. Referring to the two incidents, Kissinger stated, in response to interrogatories in this case: "I did not consider the information I then received as sufficiently unfavorable to warrant denial of employment and Top Secret Clearance to Mr. Halperin."[4]

Sometime after Haig reviewed the DOD file for Kissinger, the FBI on February 20, 1969 furnished the report of its investigation of Halperin. Although the FBI was aware of the two DOD episodes it did not consider them important enough even to mention in a 15 page single

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[1] Testimony of Alexander Haig in Dr. Kissinger's Role in Wiretapping Senate Committee on Foreign Relations, 93d Cong. 2nd Sess., 1974 at 247. Hereinafter "Kissinger" Wiretap Hearings."

[2] *Ibid.*, Kissinger Response to Interrogatory 15.

[3] *Ibid.*, Kissinger Wiretap Hearings at 182-83.

[4] Kissinger's Response to Interrogatory 18.

spaced report.[1] Nor did the FBI see fit to include the two episodes in the approval memorandum sent to Attorney General Mitchell. This memo, while noting contacts with Soviet nationals, stated that investigation of Halperin "did not disclose at that time any pertinent derogatory information."[2] Nor was this information included in the FBI's May 13, 1969 letter reporting the May 9 inquiries.[3]

While none of Halperin's security files disclose a propensity to leak they do reveal his views on issues, particularly on the Vietnam war. In a letter to Kissinger on May 13, 1969 Hoover provided a description of what had been learned from the earlier field investigation of Halperin. The letter did not deal with handling of classified information or a propensity to leak but rather views on the Vietnam war:

> In regard to Halperin, we conducted applicant-type investigations of him in 1962 and in February, 1969, and the investigations disclosed that he and other experts in his field are of the opinion that the United States leadership erred in the Vietnam commitment. In 1965 his name appeared on a list of individuals who responded to a request for public hearings on Vietnam by agreeing to sponsor a national sit-in. A confidential source abroad advised in 1965 that Halperin's name was on a list of Americans who reportedly received the "World Marxist Review Problems of Peace and Socialism," a communist publication.

It was Halperin's politics, not his discretion, that figured in the discussion of his employment by Kissinger in early 1969. Kissinger had, according to his public statements, been urged by all of his associates not to hire

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[1] Compare the summary of the interview of FBI agents with Halperin on June 18 [1968?] in the FBI Report of February 20, 1969 which makes no mention of Halperin incorrectly identifying the Russian with whom he had lunch with the FBI report of June 18 [1968?] which reports this incident. Halperin also informed the FBI agents at this meeting about his trip to the Soviet Union. Exhibits J and K.

[2] Memorandum Hoover to Mitchell May 12, 1969.

[3] Letter Hoover to Kissinger May 13, 1969.

Halperin[1] and had been informed by General Wheeler, the Chairman of the Joint Chiefs of Staff, that Wheeler was "concerned about Dr. Halperin's views and reliability."[2] Senator Goldwater had also written to Mitchell and Nixon complaining about Halperin's employment on policy grounds. (Exhibits L and M.) Kissinger had seen at least one of these letters.[3] Thus as Haig put it, Kissinger was aware that "there was a great deal of suspicion about the men that he had hired to work with him in a number of areas."[4] Nixon reported that he had heard Dr. Halperin's name not in connection with any discussion of leaks but rather as a "holdover" whose views differed from those of the administration.[5] Ehrlichman had only heard Dr. Halperin's name when Dr. Kissinger described him as being "untrustworthy," because he differed with the policies of the administration.[6]

The Federal Defendants have asserted that Halperin's "security file revealed a poor attitude about the care and maintenance of security information," and that there was a "potential security problem."[7] In fact, as plaintiffs have shown and as Haig and Kissinger, the defendants most familiar with Halperin's file and his duties have testified,

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[1] Kissinger Press Conference June 11, 1975 reprinted in Kissinger Wiretap Hearings at 3.

[2] Haig Deposition at 134.

[3] Kissinger Deposition at 183.

[4] Haig Deposition at 13.

[5] Nixon Deposition at 41.

[6] Ehrlichman Deposition at 13-14.

[7] Fed. Def. Memorandum at 10, 37.

there is nothing in Halperin's file to sustain this position.[1] The two incidents discussed here did not prevent Halperin from receiving additional sensitive clearances and they could not have provided probable cause to wiretap his phone.

The same contrast between the deposition testimony of defendants Nixon, Haig and Kissinger and the Federal Defendants' Memorandum is evident in the effort of the Memorandum to suggest that what was reported as said by Halperin on his phone justified the continuation of the surveillance after the initial FBI request to terminate and beyond the period when Halperin was on the NSC staff. (FD SJ Mem., 38 n.40)

Kissinger has stated flatly that nothing was heard on the surveillance that indicated that Halperin had leaked or that cast any doubt on his discretion or loyalty.[2] Both Kissinger and Haig urged Halperin not to leave the staff in September 1969.[3] Haig had "no problem" with Halperin's access to classified information as a result of what he read

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[1] Nixon at his deposition initially described the criterion based on files as "a tendency to be loose mouthed" [at 24] or "done something which suggests a tendency to leak" [at 61]. After consulting with counsel Nixon commented as follows:

> I should incidentally qualify, after consultation with Counsel, in the guidelines when I said if a guideline indicated a tendency to leak, I should expand that by saying a tendency to leak would be information in the file indicating that an individual was perhaps either sloppy or possibly, in some cases, intentionally, failed to dispose his travels abroad, conversations he had and et cetera. That kind of information. That all bears on a tendency to leak. (At 62).

[2] Kissinger Deposition at 88, 97.

[3] Kissinger Deposition at 59; Haig Deposition at 66.

of the tapped information.[1] Haig, after a review of the summary letters, stated that there was only one item in the letters and logs which could have constituted "a technical violation, if that material were still under classification."[2] This concerned Halperin informing a journalist in 1969 that Secretary of State Dean Rusk had opposed American intervention in Vietnam in 1961.[3]

Defendants memorandum now asserts that "[a] review of the summaries and pertinent logs support" the concern that Halperin "might, inadvertently, or otherwise, compromise" classified information.[4] The memorandum does not state who, if anyone, had or has this "concern" and there is nothing to indicate that any of the federal defendants did at the time. Despite the assurance by Federal Defendants' attorney at General Haig's deposition, the first involving a direct participant, that at some point a defendant would take responsibility for continuing the surveillance and explain what justified its continuance,[5] that question though asked consistently, was never answered.

Haig and Kissinger after reviewing the summary letters at their depositions did not alter their view that none gave concern about Halperin's discretion. Defendants cannot now argue that a review of the letters by their attorneys some 5 years after the surveillance ended can produce a concern which justified continuing the surveillance. Nevertheless, in light of the defendants' assertion that

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[1] Haig Deposition at 50.

[2] Id. at 48.

[3] *Id.* at 152. The conversation was reported in the Memorandum attached to the August 1, 1969 letters Hoover to Kissinger and Nixon and in the May 28, 1969 letters.

[4] FD SJ Mem. 38, n.40.

[5] Haig Deposition at 97.

some of the summaries give cause for concern plaintiff Morton Halperin has reviewed the summary letters again and again stated that they include no classified information.[1]

[1] Halperin affidavit July 15, 1976. This judgment was also reached by the House Judiciary Committee in its Report on Impeachment of Richard Nixon House Rep. No. 95-1305 at 149.

10 July 1968

EXHIBIT A

MEMORANDUM FOR THE RECORD

SUBJECT: HALPERIN, Morton H.
DPOB: 13 June 1938, Brooklyn, New York

REFERENCE:
(a) U. S. State Department Passport Review-3 June 1966
(b) SPH dated 17 August 1966
(c) Memo dated 8 November 1967
(d) Memo dated 13 November 1967
(e) Memo dated 18 November 1967
(f) Memo dated 3 January 1968
(g) FBI Memo dated 18 June 1968
(h) DIA Memo dated 9 July 1968

A review of the State Passport records on 3 June 1966 (a) fails to reflect any info that Subject did in fact visit Greece, Yugoslavia, or the Soviet Union as stated in (g) and (h). A recheck of State Passport should be made in an attempt to verify their records in this regard.

While attending a Soviet reception on 7 November 1967 (e) Subject had contact with [redacted], [redacted] and [redacted]. The contacts were reportedly limited to pleasantries. Subject furnished his telephone number to them upon request, for a future luncheon and stated he would be pleased to have luncheon with them.

On 16 November 1967 (e) Subject appeared on a panel with [redacted] Soviet Embassy, which involved an informal discussion on the attitudes of the Soviet Union and the United States toward disarmament.

On 29 December 1967 (f) Subject, at the invitation of the above mentioned [redacted], had lunch at the Peking Restaurant.

When interviewed by the FBI on 12 June 1968 (g), Halperin advised in part, "That he had submitted memorandum to his Department, reporting the above-described contacts with [redacted] and [redacted]. Subsequent [illegible] being shown photographs of [redacted] AND [redacted], HALPERIN [illegible] identified both men and immediately realized that he had erroneously [illegible] the [illegible] meeting with [redacted] as having taken place with [redacted]. Halperin then prepared a note for himself to make the necessary correction." (He has not done so as yet.)

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Continuing, Subject advised that in 1963 while on a world tour with his wife he spent a week in Moscow in the Soviet Union which was entered by way of Israel, Greece, and Yugoslavia. He stated that, while in Moscow, they were not part of any organized tour and spent most of the time on their own. (This was in the fall of 1963.) Halperin stated that the only Russian he actually had contact with in Moscow was one [redacted], whom he had met previously in the U. S. on two different occasions between approximately 1961 and 1963 when [redacted] visited Harvard and conferred with various professors, including Halperin. He (Halperin) said he "locked up" [redacted] in Moscow where the Soviet was at the time associated with the [redacted]. Halperin said that [redacted] is an expert in the field of world disarmament and is a writer on this subject for the Soviet publication [redacted].

Conclusions

Subject was appointed a Special Assistant GS-15, OASD (ISA) on 5 July 1966, on 19 December 1967 he was appointed Deputy Assistant Secretary (Plans and Arms Control) OASD (ISA), GS-17. He was granted a TOP SECRET, ULTRA SENSITIVE clearance on 26 August 1966 which he currently holds. Administrative Instruction No. 64 was released on 10 January 1967 (Subject - Foreign Intelligence Collection Efforts).

Subject is in a position where compliance with AI-64 is extremely essential. Subject was not completely candid in the submission of his SPR on 17 August 1966 concerning his travels abroad. He appears to have a carefree attitude concerning his obligations under AI-64 in that he did not advise the Security Division of his error in identification of who he had lunch with on 29 December 1967. There is no indication at this point what other possible contacts he has had with Soviet or Satellite Nationals since he has been with OSD, which he might consider as insignificant.

Recommendations

1. Subject be interviewed and afforded an opportunity to correct his SPR dated 17 August 1966 concerning travel in Israel, Yugoslavia and the Soviet Union. At that time he should be ruled as to why he omitted this information from his SPR.

2. Subject should be counseled on the content of AI-64 and the importance of his complete cooperation in this regard.

3. After the above has been accomplished a check of CIA should be made concerning [redacted].

4. Recheck State Passport records on the subject.

5. Upon completion of the above an evaluation will be made of all information on hand.

William K. Quinlan, Jr.
Chief AAB

EXHIBIT B

1 August 1968

MEMORANDUM FOR FILE

SUBJECT: HALPERIN, Morton H.

On this date Subject was interviewed in his office (43820) regarding omission of foreign travel data in Item 12 of his SPH dated 17 August 1966. Upon reviewing his SPH, Subject stated his typist had omitted (and he had not noticed) several items of addenda:

1. Travel to Greece, Yugoslavia and the USSR in Dec 63 - Jan 64 (in addition to other countries listed for that trip)

2. His 2 sons (a 3rd was born after subm of SPH)

David Elliot Halperin	DPOB: 28 Nov 62, Boston
Mark Evan Halperin	11 Jan 65, "
Gary Isaac Halperin	30 Mar 67, Wash, D. C.

Subject added that his permanent (and current) address has changed effective 30 August 1967. He now resides at 8215 Stone Trail Drive, Bethesda, Maryland 22034.

Regarding the prompt reporting of contacts with Soviet bloc nationals (per AI 64), Subject stated he had met several at a Soviet Embassy party and subsequently had lunch with one of them. He stated he had submitted memos regarding these contacts. He did not mention he had reported the wrong name of the Soviet with whom he had lunch. Concerning contacts with bloc nationals prior to employment with OSD, Subject stated he had met several but maintained no contact with them.

Subject stated he has made about 10 trips abroad since Aug 66 but these have all been on official OSD business, none to communist countries. If this office desires details, his secretary, Mrs. Maffett (73331) can provide a list. I suggested that, in view of the number of changes, it might be easiest to prepare another SPH, incorporating the new information, and bring it to his office for signature. He had no objection to this suggestion.

(NOTE: Capt Pace, Exec Officer, ISA, telephonically advised Subject had submitted no memoranda regarding Soviet bloc contacts subsequently to 3 January 1968).

John S. Rice, Jr.

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EXHIBIT C

FOREIGN TRAVEL (Other than as a direct result of United States military duties)

DATES FROM—	DATES TO—	COUNTRY VISITED	PURPOSE OF TRAVEL
une '61	June '61	Canada	Vacation
/15/63	12/8/63	Japan, Taiwan, Hong Kong, Thailand, Burma, India, Pakistan, Iran, Israel	Vacation, lecturing, research
			(Continued in item 20)

REMARKS

12. 1/5/64-6/30/64 England, Germany, Norway, Sweden, Denmark, France, Italy, Switzerland — Lecturing, research

9/17/64-9/21/64 England — To attend conference at Institute for Strategic Studies

SECURITY FORM 17 August 1966

FOREIGN TRAVEL (Other than as a direct result of United States military duties)

DATES FROM—	DATES TO—	COUNTRY VISITED	PURPOSE OF TRAVEL
Jun 1961	[illegible]	Canada	Vacation
/15/63	[illegible]	[illegible], Taiwan, Hong Kong, Thailand, Burma, India, Pakistan, Iran, Israel, Greece, Yugoslavia, USSR	Vacation, lecturing, Research
			To Be continued

Item 12

1/5/64-6/30/65	England, Germany, Norway Sweden, Denmark, France, Italy, Switzerland	Lecturing, Research
9/17/64-9/21/64	England	To attend conference at Institute for Strateg. Studies

SECURITY FORM 17 AUGUST 1968

EXHIBIT D

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

8 November 1967

MEMORANDUM FOR LIEUTENANT COLONEL CONLEE

SUBJECT: Soviet Reception

My only contacts with Soviet officials during the November 7 Reception were with Igor A. Rogachev, First Secretary, and Victor G. Komplektov, Counselor. In both cases the exchanges were limited to pleasantries. Both officials asked for my phone number and indicated that they would like to call to arrange a luncheon date. I gave then my number and indicated that I would be pleased to have lunch with them.

/s/ _____

MORTON H. HALPERIN
Acting Deputy Assistant Secretary
Policy Planning and Arms Control

EXHIBIT E

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

3 January 1968
In Reply refer to: 1-78/68

MEMORANDUM FOR THE RECORD

SUBJECT: Conversation with Mr. Yuly M. Vorontsov, Counselor Soviet Embassy

At Mr. Vorontsov's invitation I had lunch with him on 29 December in the Peking Restaurant.

The conversation was very general. Mr. Vorontsov seemed to have in mind only getting generally acquainted. The only points worth noting were as follows:

1. *China.* Mr. Vorontsov is, of course, keenly interested in China and seems to enjoy coming to the Peking Restaurant so that he can order his meals in Chinese. He asked a number of questions about the recent Chinese nuclear testing, to which I replied that I had not seen any of our reports on the test. He remarked that he had recently read a book which I had edited before joining the Government on Sino-Soviet Relations and that he believes several of the contributors to the volume had taken too seriously the possibility of Sino-Soviet military clashes.

2. *NPT.* Mr. Vorontsov did not appear optimistic about the NPT. He expressed great concern about the changing situation in Japan and indicated that he no longer expected that Japan would sign the treaty. I told him that Japanese public attitudes were undergoing change, but that I was confident that Japan would sign the NPT.

3. *Vietnam.* Mr. Vorontsov touched briefly on Vietnam and expressed concern about the Cambodia situation. I told him that the use by North Vietnam of Cambodia-

based camps was a matter of concern to the U.S. Government.

/s/

MORTON H. HALPERIN
Deputy Assistant Secretary
Policy Planning and Arms Control

SECURITY BRANCH
DIRECTORATE OF ADMINISTRATIVE SERVICES
SIOP-ESI ACCESS CERTIFICATE

References: a. SM-431-67 dated 20 June 67
b. JAI 2511.8 Series

SECTION I (SIOP-ESI BRIEFING)

I acknowledge that I am authorized to SIOP-ESI, Category CI, in connection with my present duty assignment.

I certify that I will not communicate, transmit, or disclose in any manner information concerning SIOP-ESI or related information entrusted to me by virtue of this authorization to any person not currently authorized access to such information, and then only when required by my duty assignment to do so.

I will not disclose to any unauthorized person the fact that I am the recipient of SIOP-ESI.

When my duties no longer require such information, I will execute the debriefing certificate as required by the references, in order that my name may be removed from the approved list of personnel authorized access.

I appreciate that a compromise of the SIOP-ESI could cause exceptional grave danger to the United States, and I do solemnly certify that I will carry out faithfully my responsibilities inherent in receiving such information.

18 Aug 1969 Morton H. Halperin

Date Signature, Grade, Service, and Service Number
MORTON H. HALPERIN, GS-17, DASD/ISA, 073 30 8125

SECTION II (SIOP-ESI DEBRIEFING)

I am aware that I am no longer authorized access to SIOP-ESI, Category_____.

Pursuant to the obligation which I incurred at the time of being authorized access to this information, I reaffirm that I will never hereafter divulge nor discuss such information which I have acquired as an authorized recipient, unless required to do so by competent authority.

App 236

Date Signature, Grade, Service, and Service Number

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EXHIBIT C

FOR OFFICIAL USE ONLY

SUBJECT: Morton H. Halperin
(Security Clearance Information)

Morton H. (initial only) Halperin, no aliases, born 13 June 1938, Brooklyn, New York, U.S. citizen, SSAN: 073-30-8125, has held personnel security clearance approvals with the Department of Defense as set forth herein.

Headquarters USAF, Washington, records reflect a Top Secret clearance was issued Halperin as a Consultant to Rand Corporation on 27 September 1961, although there is record with DSA that this Top Secret clearance was issued 19 December 1961 by the ARDC Regional Office USAF.

DISCO (Defense Supply Agency) issued a Top Secret clearance for Halperin as a Consultant, type A, 29 June 1970 to Rand Corporation, Social Science Department, superseding the clearance granted in 1961 above.

Personnel Division, Office of the Secretary of Defense, nominated Halperin for a security clearance by memorandum 2 November 1962 to Security Division, OSD, for employment as a Consultant, CASD (ISA).

Top Secret clearance was granted him 28 November 1962 by Security Division, OSD, based on full field background investigations by OSI, 19 September 1961, FBI 24 September 1962, and NAC by Security Division, OSD 20 November 1962. Halperin signed Secrecy Agreements 27 June 1962 and 11 March 1963.

Security Division, OSD, re-issued Halperin's Top Secret clearance as Consultant (ISA) 12 August 1963 based on full field background investigation by Department of State 12 February 1963.

Personnel Division, OSD, terminated Halperin's appointment as Consultant, OASD (ISA), 30 June 1966 (end of FY) and his Top Secret clearance was administratively terminated by Security Division, OSD, on that date.

Personnel Division, OSD, appointed Halperin Special Assistant, OASD (ISA), Immediate Office, on 5 July 1966. On 1 July 1966 Security Division, OSD, granted Halperin a Top Secret clearance, based on conversion of his clearance as Consultant, OASD (ISA), above. Halperin signed a Secrecy Agreement 5 July 1966. He was designated Acting Deputy Assistant Secretary of Defense, OASD (ISA), Planning and Arms Control, 17 August 1967, and appointed to this position 19 December 1967. Effective 15 April 1969 Halperin was appointed by Personnel Division, OSD, to the position of Special Assistant to the Assistant to the President for National Security Affairs, OASD(A), White House Support Group. During his employment tenure with Office of the Secretary of Defense July 1966 to 19 September 1966 Halperin was given Special Access approvals to Cofram, Cosmic, Military Space Programs, Seato, SIOP-ESI-01, and USIB Programs. He was appropriately briefed and debriefed from these programs and signed a Security Termination Statement 19 September 1969.

The National Security Council granted Halperin a Top Secret security clearance in 1969, Halperin asserts on a Personnel Security Questionnaire.

Defense Supply Agency, Contract Administration Services by memorandum 7 July 1971 to OASD(A) advised that, at its request, a check was made by the Security Officer, Rand Washington, with the Accounting Department, Treasurer's Office, Rand Santa Monica, which disclosed that since 1 January 1969, Halperin has been paid for only one eight hour period (26 August 1970) as a Consultant.

DCASR, Los Angeles, on 7 July 1971, checked with the President of Rand, Santa Monica, to determine whether there was a valid need to continue the Top Secret clearance of Halperin.

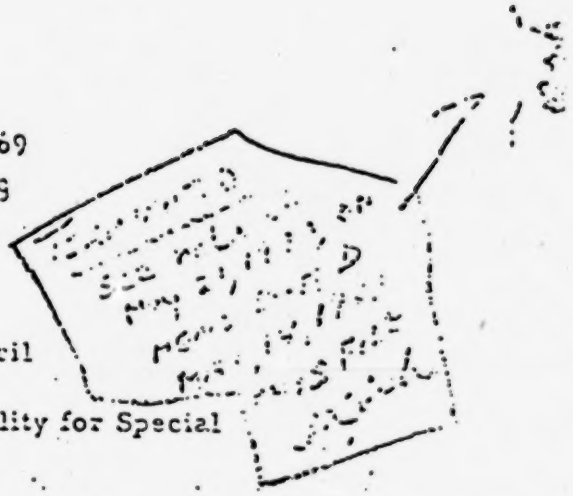
The Rand President stated that Rand will provide justification in writing for continuation of Halperin's Top Secret clearance. Rand has received a recent contract from the State Department (a User Agency) which specified that Halperin be assigned as the principal consultant (in-

vestigator) in the performance of that contract. However, DSA having since learned that the Department of State contract is at the Secret level will point out that a Secret clearance is all that Halperin will need.

EXHIBIT H

SSC-0207-69

6 MAR 1969



MEMORANDUM FOR: A. Russell Ash
National Security Council

SUBJECT : Transfer of Accountability for Special Clearances

1. Reference is made to your memorandum dated 30 January 1969, Subject: Transfer of Accountability for Special Type Clearances (Persons Transferred to or Detailed to NSC Staff from Other Agencies).

2. This is to advise that accountability for special clearances held by individuals listed in reference memorandum have been transferred from their parent organization to the National Security Council. Inasmuch as the cut off date on the input to the March 1969 machine run listing was 27 February 1969, it is doubtful if the transfer of accountability will be reflected on the March 1969 listing. However, the transfer will be reflected on the April 1969 machine run.

W. M. Knott

W. M. Knott
Chief, Special Security Center

8 MAR 1969

HALPERIN, Morton H.----------

EXHIBIT I

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

January 30, 1969

MEMORANDUM FOR MR. DAVID WHITEHILL
CENTRAL INTELLIGENCE AGENCY

SUBJECT: Transfer of Accountability for Special Type Clearances (Persons Transferred to or Detailed to NSC Staff from Other Agencies)

Confirming advice given to you on the telephone today, the following persons are in the process of transfer to or detail to the National Security Council Staff from other Government departments; it is understood that they hold various special, compartmented clearances; and they will need to retain them in the performance of official NSC Staff duties:

[redacted]
HALPERIN, Morton H.
[redacted]

A. R. Ash

By way of reminder, on January 28, 1969, I sent over to you Form No. 2018a concerning the following:

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EXHIBIT J

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

Reply, Please Refer to File No.

Washington, D. C. 20535
June 15, [redacted]

DR. MORTON H. HALPERIN

On June 12, [redacted] Dr. Morton H. Halperin, Deputy Assistant Secretary, Plans and Arms Control, Office of Assistant Secretary of Defense for International Security Affairs, Room 4E838, Pentagon Building, Washington, D. C. (WDC), was interviewed by representatives of the Federal Bureau of Investigation (FBI), at which time he furnished the following information:

Halperin said that he first met [redacted] on November 7, [redacted] at a reception at the Soviet Embassy, WDC, on the occasion of the commemoration of the [redacted] of the Soviet Revolution. He stated that the Soviet Embassy sent invitations for the reception to perhaps twenty officials of the United States Department of Defense, and he was included as a result of his present position. He pointed out that the invitations were not sent to particular officials by name but simply in a group to the Department for appropriate utilization.

[redacted] Halperin advised that, during the course of the above reception and while talking with an unrecalled [redacted], [redacted] and was introduced to Halperin by the [redacted]. Halperin said that it appeared [redacted] was aware of Halperin's identity prior to the introduction, although [redacted] did not indicate this in so many words. Conversation with [redacted] at this time was inconsequential and not recalled by Halperin. He said that [redacted] told him that he would like to have Halperin as his luncheon guest soon.

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DR. MORTON H. HALPERIN

Sometime in December, [DELETED] according to Halperin, someone telphonically contacted his secretary and made a luncheon appointment for [DELETED] with Halperin for later in the month at the [DELETED] Restaurant, WDC.

At this point in the interview, Halperin said that sometime between meeting [DELETED] at the Soviet Embassy reception and his luncheon engagement with him in [DELETED] 1967, he (Halperin) appeared [DELETED] with [DELETED] WDC, involving a discussion on the activities of the Soviet Union and the United States on disarmament. Halperin said this discussion was held in a [DELETED] situated near the Capitol in WDC.

Concerning his luncheon engagement with [DELETED] Halperin stated that they were together for about one and one-half hours, their meeting was pleasant, and [DELETED] was congenial and at ease with him. Halperin said that [DELETED] claimed to have [DELETED] knowledge of the [DELETED] In the latter connection, [DELETED] did order their lunch at the [DELETED] Restaurant [DELETED]. Halperin advised that he could not evaluate [DELETED] knowledge and experience in [DELETED] since their conversation was confined to generalities and since neither of them was willing to divulge anything of significance.

Halperin said that he had submitted memoranda to his Department, reporting the above-described contacts with [DELETED] and [DELETED]. Subsequent to being shown photographs of [DELETED] and [DELETED] Halperin identified both men and immediately realized that he had erroneously reported the luncheon meeting with [DELETED] as having taken place with [DELETED] Haperin then prepared a note for himself to make the necessary correction.

By the way of background, Halperin advised that, beginning in June of 1963, while on the faculty of Harvard University, he and his wife went on a world tour, combining business and pleasure, and starting out in the Far East

and proceeding westward. The trip included a week's stay in Moscow in the Soviet Union which was entered by way of Israel, Greece, and Yugoslavia. Halperin said that, while in Moscow, they were not part of any organized tour and spent most of the time on their own. During this period in Moscow, which was in the Fall of 1963, they had several Intourist guides, one of whom was a woman. Halperin stated that he was not aware of any surveillance while in Moscow and could not recall that anyone showed any undue interest toward him or his wife.

Halperin said that the only Russian he actually had contact with in Moscow was [DELETED] whom he had met previously in the United States on two different occasions between approximately [DELETED] and [DELETED] when [DELETED] visited [DELETED] and [DELETED] with [DELETED] professors, including Halperin. Halperin said he "looked up" [DELETED] in Moscow where the Soviet was at that time assigned and with the [DELETED]. Halperin said that [DELETED] is an expert in the field of [DELETED] and is a writer on this subject for the Soviet publication "International Affairs." Halperin said that, as of [DELETED], when he saw [DELETED] in Moscow, he (Halperin) had written nothing on the subject of China, and their mutual interest was [DELETED].

Halperin continued, stating that during the course of his world tour, he went to London, England, and remained there from September of 1963 until April of 1964, although he made several short trips out of London. From April of 1964, until June of 1964, Halperin and his wife resided in Geneva, Switzerland.

Halperin said that he did not leave Harvard University until July of 1966. While at Harvard, he was an Assistant Professor of Government and engaged in teaching International Relations which included such subjects as "American Foreign Policy" and "International Politics."

Halperin advised that, during his years at Harvard, he had occasion to meet several Russians who visited the University and sought out their particular area of interest,

none of whom he recalls other than [redacted], but he has had no further contact, through correspondence or otherwise, with any of them. In addition, Halperin stated that he has no clear recollections of any contacts with Soviet nationals in the United States after his departure from Harvard other than those reported above.

[redacted] of several Soviets, other than [redacted] and [redacted], were [redacted] to Halperin, but he could not identify any of them.

The [redacted] edition of the "Diplomatic List," published by the United States Department of State, describes [redacted]

This document contains neither
recommendations nor conclusions of
the FBI. It is the property of
the FBI and is loaned to your agency;
it and its contents are not to be
distributed outside your agency.

EXHIBIT K

FBI MEMORANDUM RE MORTON H. HALPERIN
February 20, 1969

Excerpt pp. 12–14

Morton H. Halperin

Dr. Halperin, when interviewed in June, advised that prior to July, 1966, he was an Assistant Professor of Government at Harvard University, Cambridge, Massachusetts. He stated during his years at Harvard University he had occasion to meet several Russians in connection with visits those individuals made to Harvard University. He said he and Mrs. Halperin were on a world tour combining business and pleasure commencing in June, 1968, and while on this tour they stayed in Moscow, Soviet Union, for a week during the Fall of 1963. Mr. Halperin advised he could not recall that anyone in Moscow showed any undue interest toward him or his wife. He said during their stay in Moscow he "looked up" one [DELETED], a Russian who had previously conferred with him and other professors on visits [DELETED] made to Harvard University in about [DELETED] and [DELETED]. He said [DELETED], an expert in the field of [DELETED] and a writer on that subject for the Soviet publication, "International Affairs." was associated with the [DELETED]. Dr. Halperin advised that when he saw [DELETED] in Moscow in 1963, he, Dr. Halperin, had not yet written anything on the subject of China, and their mutual interest was disarmament.

Dr. Halperin stated he first met [DELETED] at a reception at the Soviet Embassy in Washington, D.C., on November 7, [DELETED]. He said approximately twenty officials of the Department of Defense were invited to attend this reception and the invitations were not addressed to these officials by name but were sent to the Department of Defense for appropriate utilization. Dr. Halperin stated that [DELETED] was introduced to him at this reception

by a [DELETED] whose name he could not recall. He advised that his conversation with [DELETED] on this occasion was inconsequential and the details of their conversation were not recalled.

According to Dr. Halperin, in December, [DELETED] he appeared [DELETED] at a [DELETED] in Washington, D.C., which [DELETED] involved a discussion on the attitudes of the Soviet Union and the United States on disarmament. He said [DELETED], [DELETED] Washington, D.C., also appeared on this panel. He stated that subsequently during December, [DELETED] he had a luncheon engagement with [DELETED] in Washington, D.C., the luncheon engagement having been arranged by someone who telephonically contacted him, Dr. Halperin's, secretary. Dr. Halperin said [DELETED] as congenial and at ease, and their meeting was pleasant. He said [DELETED] claimed to have [DELETED] knowledge of the [DELETED]. Dr. Halperin advised that their conversation was confined to generalities on this occasion.

Dr. Halperin advised he had submitted memoranda to the Department of Defense reporting his aforementioned contacts with [DELETED] and [DELETED]. He said he had no recollection of any other contacts on his part with Soviet nationals in the United States subsequent to his employment by Harvard University.

With regard to the information furnished by Dr. Halperin in June, [DELETED] the files of the Department of Defense indicate that in November, [DELETED], and January, [DELETED] Dr. Halperin submitted memoranda setting forth information concerning his contact with [DELETED], mentioned by Dr. Halperin, may on identical [DELETED], a Soviet national who visited several universities in the United States, including Harvard University, Cambridge, Massachusetts, in [DELETED]. His trip to the United States was reportedly sponsored by the [DELETED].

L 641

March 10, 1969

The President
The White House
Washington, D. C.

Dear Mr. President:

After meeting with you the other evening and visiting around a bit, I feel I should write you to try and impress upon you the urgency of more rapid changes in personnel lest you lose control of the government.

You will recall, as I discussed with you, that President Eisenhower had this calamity befall him, and I don't want to see it happen to you, but if we can't move in the decision making areas and do it completely by another month, I think you are going to see trouble begin to arise.

As a good example, and you can check this with him, I saw Arthur Burns the other day and he cited me this experience that he had just recently. He had heard that there were discussions being held relative to financing Social Security out of the income tax. Naturally, this disturbed him as it would you or me, so he sent a memorandum down to the Treasury asking about this.

He received in due time a letter thanking him for this and stating that it was a very interesting proposal and that the Secretary would delve into it. Obviously Secretary Kennedy did not write this letter. He might not even have signed it but somebody did in the echelons of his think tank write it and it has probably by now some official stigma to it.

I cited to you the case of Mr. Kissinger taking Mr. Halperin, one of the really troublesome actors who was dismissed from the Defense Department, and I am hearing more and more tales of these people who caused so much trouble during the Johnson Administration being kept in their present jobs or being shuffled around so they are not lost.

I hope you will not mind my writing you on problems like these but, as I told you the other evening, our first job has been completed, that of getting you elected, and our next job of getting you re-elected has already begun and, while I have a feeling the job will be a lot easier, I don't want to make it any harder by being remiss in not [illegible]

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In closing and on another subject, I think you know of my great interest in having Bill Quinn appointed Ambassador to Greece, and I have one further suggestion; if you haven't picked one for Ireland, one of your best friends and a wonderful Republican woman, Rose Saul Zalles, would be great for that spot.

With warm wishes and respect,

Barry Goldwater

BG/judy

AERONAUTICAL AND SPACE SCIENCES
ARMED SERVICES
PREPAREDNESS INVESTIGATING SUBCOMMITTEE
TACTICAL AIR POWER SUBCOMMITTEE
NATIONAL STOCKPILE AND NAVAL PETROLEUM RESERVES SUBCOMMITTEE

United States Senate

WASHINGTON, D.C. 20510

PERSONAL AND CONFIDENTIAL

April 22, 1969

The Honorable John Mitchell
The Attorney General
Department of Justice
Washington, D. C.

Dear John:

First, I want you to know how much I enjoyed visiting with you at lunch the other day and I only hope we can do it once in a while in the interest of the Party.

I told you I would send you a list of names and here they are: Halperin is on the NSC staff and, as I understand it, works under Kissinger; [redacted]

These are the people who made it so hard for the military to operate in the Pentagon by their strategic papers which were forced down the throats of the Joint Chiefs and Commanders. I really thought that Mel had gotten rid of most of them but, obviously, he hasn't and unless he has a good reason for keeping them, I am afraid it will mean trouble.

With best wishes,

Barry Goldwater

OFFICE OF THE ATTORNEY GENERAL
RECEIVED
APR 25 1969

Exhibit 3

GIFT OF PAPERS AND OTHER HISTORICAL MATERIALS OF MORTON H. HALPERIN TO A PRESIDENTIAL LIBRARY TO BE DESIGNATED

1. In accordance with the provisions of Chapter 21 of Title 44, United States Code, and subject to the terms, conditions, and restrictions hereinafter set forth, I, Morton H. Halperin (hereinafter referred to as the Donor), hereby give donate, and convey to the United States of America, for eventual deposit in a Presidential Library to be designated at a later date, my papers and other historical materials (hereinafter referred to as the Materials) which are described in Appendix A, attached hereto.

2. Title to the Materials shall pass to the United States of America upon their delivery to the Archivist of the United States (hereinafter referred to as the Archivist).

3. Following delivery, the Materials should be maintained by the United States of America in a depository administered by the National Archives and Records Service of the General Services Administration until a Presidential Library is designated by the Donor, at which time they shall be deposited in that Library and administered in accordance with the pertinent provisions of Chapter 21 of Title 44, United States Code; and, provided, that any time after delivery and subject to the provisions of paragraph 5, the Donor shall be permitted freely to examine any of the Materials during the regular working hours of the depository where they are preserved.

4. It is the Donor's wish that the Materials be made available to research to the fullest extent possible, following their deposit in the designated Library. At the same time, it is his wish to guard against the possibility of their contents being used to embarrass, damage, injure, or harass living persons, and to safeguard the interests of the United States of America. Accordingly, the Director of the designated Library (hereinafter referred to as the Director) shall have the Materials reviewed and shall place under seal the following classes of material:

(a) Material relating to the personal, family, and confidential business affairs of the Donor or of persons who have had correspondence with him.

(b) Material relating to investigations of individuals and organizations, to proposed appointments to office, or to other personnel matters.

(c) Material containing statements made by or to the Donor in confidence, unless in the judgment of the Director the reason for the confidentiality no longer exists.

(d) All other material which contains information or statements that might be used to embarrass, damage, injure, or harass any living person.

(e) Material containing statements or information the divulgence of which might prejudice the conduct of foreign relations of the United States of America.

(f) Materials which are security-classified pursuant to law or Executive order, or which contain information the public release of which would adversely affect the security of the United States of America.

5. Following the completion of the review provided for above, material placed under seal shall not be made available for inspection, reading, or use by anyone, except regular employees of the National Archives and Records Service in the performance of normal archival work on such materials, and the Donor, or persons authorized by him in writing to have access to such materials; provided that information which is security-classified pursuant to law or Executive order shall be made available only in accordance with procedures established by law or Executive order governing the availability of such information.

6. Materials which have been placed under seal as herein provided shall be kept under seal until June 30, 1976 and thereafter shall be reviewed by the Director from time to time and the seal removed from any papers which, because of the passage of time or other circumstances, no longer require such restrictions.

7. Subject to the restrictions imposed herein, the Archivist may dispose of any of the Materials which he determines to have no permanent value or historical interest, provided that prior to any such disposal the Donor shall be notified thereof, and at the Donor's request, the Materials proposed for disposal shall be returned to the Donor.

8. The Donor hereby gives and assigns to the United States of America all literary property rights which he has in (a) such of the Materials as are unpublished and (b) in such of his unpublished writings as may be among any collections of papers received by the United States of America from others and deposited in any depository administered by any agency of the United States of America.

9. In the event that the Donor may from time to time hereafter give, donate, and convey to the United States of America, for deposit in the designated Library, additional papers and other historical materials, title to such additional papers and other historical materials shall pass to the United States of America upon their delivery to the Archivist, and all of the foregoing provisions of this delivery to the Archivist, and all of the foregoing provisions of this instrument of gift shall be applicable to such additional papers and other historical materials. A description of the additional papers and other historical materials so donated and delivered shall be prepared and attached hereto.

/s/ _____

MORTON H. HALPERIN
Donor

Date: 29 June 1971

Pursuant to the authority of Chapter 21 of Title 44, United States Code, the foregoing gift of the papers and other historical materials of the Donor is accepted on behalf of

the United States of America, subject to the terms, conditions, and restrictions hereinbefore set forth.

/s/ _____

JAMES B. RHOADS
Archivist of the United States

Date: June 30, 1971

APPENDIX A

Box 1

Notebook "Clifford Group 1968"
Notebook "National Security Study Memorandum 3"
Notebook "Strategic Arms Limitation Talks, Basic Book"
Notebook "Vietnam March 31, 1968–October 31, 1968"

Box 2

Notebook "Strategic Missile Talks"
Notebook "Vietnam DPMS 1967"
Notebook "Vietnam 1968"
Notebook "ABM"
Notebook "Vietnam Negotiations"

Box 3

Folders—Halperin Chron. Files July 1966–Jan. 1969 (7 folders)
Folder—Alternative Fifteen Month Program for Vietnam
Folder—Memos of Conversation
Folder—Memos of Conversation—Sr. officials
Binder "Vietnam Options 1969"

Box 4

Binder "Planning for Counterinsurgency"
Folder "Vietnam Bombing"
Notebook "Major Security Issues"
Binder "Vietnam Negotiations, 1967–1968"
Notebook—Vietnam Material (not marked)

Box 9

Notebook "Vietnam Speech"
Notebook "Vietnam June 26, 1969–"
Notebook "Vietnam"
Notebook "NSC/RG"
Notebook "Vietnam 1969"
Notebook "NSSMs—completed"

Box 10

3 folders—unmarked—Halperin chron. file Jan.–Sept. 1969
Memorandum to Halperin from Henderson

[Filed Jan. 18, 1976]

In The United States District Court for The District of Columbia

Civil Action No. 1187-13

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

FEDERAL DEFENDANT KISSINGER'S RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Comes now Federal defendant Henry A. Kissinger, by and through his undersigned attorneys, and responds to the Plaintiffs' interrogatories as follows:

(1) Please describe, give the date of, and identify who was present at any and all meetings which you attended during 1969, prior to May 9, at which any of the following subjects were discussed: (a) leaks, (b) wiretapping of government officials and newsmen, (c) the hiring or retention on your staff of Morton Halperin.

Response: 1(a). With respect to meetings prior to May 9, 1969, at which leaks were discussed:

In this period, basic changes in policies were being considered which would establish fundamental approaches to major foreign policy and national security issues, including, for example, reexamination of the United States strategic posture, negotiating positions in strategic arms limitations talks (SALT), a new initiative towards the People's Republic of China, negotiations to end the war in Vietnam, defense and political issues before the Atlantic

Alliance, the Arab-Israeli dispute and East-West trade. Because of the complexity and sensitivity of these matters, we earnestly believed that secrecy with respect to their consideration and of decisions taken was of vital importance and that success or failure of particular initiatives could depend upon the maintenance of the necessary confidentiality. Consequently, there was great concern about leaks in this period.

It is impossible for me, nearly seven years later, to recall the dates of meetings at which leaks were discussed, or who was present at each. I met with President Nixon on practically a daily basis and some days, several times. We occasionally discussed the problem of leaks. From time to time I discussed leaks with several of my close associates, including Morton Halperin. The subject was, I believe, considered at various senior NSC staff meetings. I had discussed leaks with other Administration officials, as noted in responses to subsequent questions. The last conversation I had with President Eisenhower was when he called me from Walter Reed Hospital to protest that information that had been given to him by President Nixon only two days before as extremely confidential had found its way into a newspaper on the day that he called. The leak that President Eisenhower called me about concerned the National Security Council meeting on the Middle East.

Although I cannot recall the details of such meetings or discussions, the general purport was that leaking of confidential information could seriously impede the Administration's ability to formulate decisions, to implement policies and to carry on negotiations concerning foreign affairs. Certain of such meetings are referred to in the responses to subsequent questions.

1(b). With respect to meetings prior to May 9, 1969, at which wiretapping was discussed:

I recall specifically only one meeting prior to May 9, 1969 which wiretapping was discussed. That meeting occurred in the Oval Office on or about April 25, 1969. I was called into the meeting while it was in progress. The President, the Attorney General and Director Hoover

were present. The problem of leaks and how to control them was being discussed. It was at this meeting (referred to in greater detail in the response to Question 14), insofar as I know, that electronic surveillance was authorized as part of a program to discover the source of and to stop leaks.

To the best of my ability to reconstruct times and places of meetings in early 1969, the meeting referred to occurred on or about April 25, 1969, as mentioned above. In the early months of the new Administration, systems of logs and memoranda of meetings were sporadic and undeveloped. My own regular keeping of logs did not begin until October 6, 1969. Accordingly, I have not been able to confirm by any documents the exact date of this particular meeting.

During this period I met from time to time with Alexander Haig and discussed with him the electronic surveillance program authorized by the President and the role of my office as I understood it. I do not recall the exact dates of my meetings with General Haig. This occurred after the Oval Office meeting.

1(c). With respect to meetings prior to May 9, 1969, at which the hiring and retention of Morton Halperin was discussed:

The subject of the hiring and employment of Morton Halperin was, at one time or another, raised with me by President Nixon, John Mitchell, H. R. Haldeman, General Haig, General Wheeler and J. Edgar Hoover. It is impossible to fix the number of such discussions. Meetings would have been held in the President's office or in my office in the White House.

Sometime early in 1969, I was briefed orally by Russell Ash, the NSC security officer, about the security record of Morton Halperin. I am advised that one such meeting occurred on or about January 21, 1969.

The matter of reviewing security records of the NSC staff was referred by me to Alexander Haig with whom I had a number of discussions in regard to the hiring and employment of Morton Halperin.

President Nixon once called to my attention a letter received by the Attorney General from Senator Goldwater commenting unfavorably on the employment of Morton Halperin.

Chariman Wheeler of the Joint Chiefs of Staff once called on me regarding the employment of Morton Halperin. My recollection is that he recommended against Mr. Halperin's employment.

(2) Please state what was said at each such meeting and insofar as you can remember it, who said it.

(a) Please state whether Morton Halperin was mentioned at any of those meetings. If so, who brought his name up, what was said about him, and by whom. Identify who was present and precisely what was said at any such meeting.

(b) Did you have any other conversations, face-to-face or by telephone during 1969, prior to May 9 at which any of the subjects referred to in Question 1 were discussed? If so, please indicate:

a) the date

b) the other person or persons involved

c) the substance of the conversation, and who said what

d) whether Morton Halperin was mentioned in any such conversation.

Response: It is impossible to state what was said at each meeting referred to above. Insofar as I remember the substance or purport of particular meetings, that recollection is stated in this response and in the responses to other questions.

Morton Halperin was mentioned at certain of such meetings, including the meeting at the Oval Office referred to in the responses to Questions 1 and 14. He was also mentioned in meetings I had with Alexander Haig concerning his security status. Morton Halperin's name also came up from time to time in discussions I had with President Nixon, Attorney General Mitchell,

H. R. Haldeman and John Ehrlichman. I have no record of these discussions.

With respect to other conversations at which the subject of leaks was discussed: As stated in the responses to other questions, I had conversations on the subject of leaks with the individuals referred to in my response to Question 1(a) as well as others.

Business telephone calls from my White House office were usually monitored by my personal secretaries, who then prepared brief summaries of those conversations. The summaries are not complete, and may not, in some cases accurately reflect the substance of the conversations covered. An examination of these summaries of conversations prior to May 9, 1969, does not disclose any conversation concerning Morton Halperin or the wiretap program. They do, however, reflect some conversations in which leaks were discussed, the gist of which is set forth below.

Federal defendant Kissinger objects to providing the names of third persons not parties to this litigation on the grounds that the names of those persons are not relevant to the litigation and further that providing such names would constitute a violation of the right of privacy of such persons.

On February 3, 1969, I spoke with [A]. The summary of that conversation states, in part: "K and [A] discussed press leaks."

On February 19, 1969, I had a conversation with [B]. The summary of that conversation states, in part: "K said this was probably unnecessary call but President is very anxious that there be no leaks of any sort about trend of the discussion today. [B] said he would say nothing."

On March 18, 1969, I had a conversation with [C]. The summary states, in part: "HAK said the President's first concern was if the things we are trying to do leaked, it would lose its effectiveness."

On March 28, 1969, I had a conversation with [D] regarding stories in the *Times* and *Post* on March 27 and March 28. [D] reported on his unsuccessful efforts to find the source of the leaks.

On April 4, 1969, I had a conversation with [E] concerning an article in the *New York Times*. The summary of that conversation states, in part: "[E] said if we were in Hanoi's position and we saw it in the newspaper we would think they were exploiting private talks for political purposes. K said that is right . . ."

On April 7, 1969, I had a conversation with [F]. The summary states, in part:

> "HAK said to [F] 'You are getting into a great negotiating position—they are all giving away Vietnam in the newspapers'. [F] wished people wouldn't talk so much. He referred to [G]. [H]—that isn't going to be very helpful. He also referred to [I's] remarks . . . HAK asked if all this will hurt us in Vietnam and [F] said yes."

On April 8, 1969, I discussed an article with [J]. We both agreed we would like to find out the source of the article.

On May 1, 1969, I discussed with [L] the *New York Times* story on the NSC review of American military policy. The summary states in part:

> "[L] said on reading NYTimes this morning re result of the NSC review of American military policy, he projected it few weeks ahead and saw similar story on our SALT review. K said this did not come from the White House and [L] asked whether President could not point out how absolutely intolerable this is. K said he was outraged by it. [L] said there was a story a few weeks ago that looked like it had Pentagon origin. K said [M] is clearly an [N] correspondent. [L] said he hopes the President asks [O] to get his troops in better array from now on. K said he would do what he could."

On May 2, 1969, I had a conversation with [P], in which we disucssed a news story. The summary states, in part:

> "[P] then brought up [R] story—said it did not come from there. [P] said he had very confidential information that it came from college roommate in K's shop who has long talks with [R]. K said he would not stand for that. [P] said he would try to check it out a

little more. K said his staff has orders not to talk to press on anything."

On May 7, 1969, [Q] and I had a conversation concerning our negotiations with the North Vietnamese. The summary states, in part: "[Q] said they were very worried about the leaks. They were serious about private talks but they doubted that we were."

(3) Did the subject of the legality of electronic surveillance ever come up in any of these meetings or conversations? If so, state as precisely as you can what was said and by whom.

Response: As noted in response to Question 14, the subject of the legality of electronic surveillance came up in the Oval Office meeting. It was my understanding, gained at that meeting, that President Nixon had been assured by the Attorney General that the proposed program was legal and that procedures were in place for carrying out of such a program. Director Hoover also assured President Nixon that the practice had been carried out on numerous occasions in prior administrations and that there was no question as to its legality.

I do not recall any other conversations with the Attorney General regarding the legality of the wiretapping program and procedures. My recollection is, however, that the Attorney General was very firm in his view that the program was legal and consistent with established practice. I did not then question the Attorney General's opinion, nor do I recall anyone ever suggesting, before or while the program was in effect, that it was unlawful or not in accordance with established procedure.

(4) At any of those meetings did Mr. Nixon, in your presence, ever authorize Mr. Hoover to conduct an electronic surveillance program. If so, identify the date of the meeting, and precisely what authority Mr. Nixon gave to Mr. Hoover. State who else was present or then or later knew of such authorization.

Response: As stated in the response to Question 14, President Nixon, in my presence, authorized the program of wiretapping as described in that response. I do not re-

call any discussion as to the President's precise authority but the Attorney General confirmed that the program as authorized was legal.

(4 A) Did Mr. Nixon ever specifically authorize Mr. Hoover in your presence to conduct a surveillance of Morton Halperin? If so, specify [sic] the meeting, who was present and precisely what Mr. Nixon said and what he authorized Mr. Hoover to do.

Response: At the Oval Office meeting in April 1969, President Nixon authorized an electronic surveillance to be conducted of the scope stated in response to Question 14. While his authorization was in general terms and not limited to specific individuals, my understanding was that he then directed surveillance of Morton Halperin and certain others.

(4 B) Was it ever represented to you by any person that Mr. Nixon had given either of the authorizations referred to in questions 4 and 4A? If so, by whom was it so represented, when and what were you told?

Response: As stated in the responses to Questions (4) and (4A), the authorizations referred to in questions (4) and (4A) were given in my presence, in the manner described in my responses to those questions. I do not know of any other authorizations and I have no recollection of any authorizations being represented to me by any other person.

(5) At any of these meetings or on any other occasion, did Mr. Nixon or anyone else direct or request you to participate in any way in an electronic surveillance program or in any action which you understood would lead to or be connected with such surveillance?

Response: As stated more fully in the responses to other Questions, at the Oval Office meeting I was requested to supply the names of key individuals who had access to sensitive information which had leaked. I do not recall that either President Nixon or anyone else directed or requested me to participate in any other way in any electronic surveillance program or any other action which I understood would lead to or be connected with such sur-

veillance, except as I have stated in responses to other Questions. See particularly responses to Questions (4), (4A), (4B), and (14).

(6) At any of these meetings or any other occasion did Mr. Nixon direct you to have your office submit to the FBI (a) a specific request that an individual be wiretapped or (b) a suggestion to that effect.

Response: At the Oval Office meeting in April, 1969, I was requested to supply the names of key individuals having access to sensitive information which had leaked. The direction to me was in general terms. Except as stated in the responses to Questions (4A) and (14), I do not recall any specific request or suggestion by President Nixon that any particular individual be wiretapped.

(7) At any of these meetings, in your presence, did Mr. Nixon direct Mr. Mitchell to approve any wiretap requests conveyed to the FBI by your office.

Response: Except as stated in the responses to Questions (4A) and (14), I do not recall that, at any meetings, President Nixon, in my presence, directed Mr. Mitchell to approve any particular wiretap requests. President Nixon authorized and directed that the program be carried out.

(7 A) If the answer to any of question 5, 6, or 7, is yes, please identify the occasion, the date, and as precisely as you can, what the President said. Also, please state who else was present and who, then or later, knew of such directions.

Response: Details, to the best of my recollection, of the meeting referred to in the response to Question 5, are set forth in the responses to Questions (4), (4A), (4B), and (14).

(7 B) Was it ever represented to you that Mr. Nixon had given directions referred to in questions 5, 6, or 7? If so, by whom, when, and what were you told?

Response: Not that I recall. See the responses to Questions (4B), 5, 6 and 7.

(8) Please identify any and all documents you may have consulted and any and all conversations you may have had to refresh you [sic] recollection in answering questions 1 through 7B.

Response: To refresh my recollection in answering questions (1) through (7B), I have consulted my testimony on the subject of wiretapping on several occasions before the Senate Foreign Relation Committee and documents furnished to me in connection with that testimony. I have also consulted my appointments book and memoranda of telephone conversations. I have also reviewed parts of certain depositions and affidavits heretofore filed in this proceeding.

(9) Did any of the meetings and conversations referred to in interrogatories 1 through 7B take place as a result of specific leaks? Were specific leaks discussed at any such occasion? If so, please identify each leak which was discussed at such meeting or in such conversation.

Response: I am certain that most, if not all, of the principal successive leaks were discussed in conversations I had with President Nixon and others as mentioned in the response to Question 1(a). At this date, I cannot place the time and purport of paritcular conversations, except those mentioned in responses to other questions, particularly in the responses to Questions 2 and 14. I am certain that I expressed my profound concern over the fact that the contents of secret documents and meetings were being leaked and for the effect of leaks and their implications on our negotiating ability and indeed ability to carry on a constructive foreign policy for the country. Set forth is a list of various articles appearing in the press prior to May 9, 1969, which may have been the result of or influenced by leaks. The list is neither complete nor accurate. It is impossible for me, at this date nearly seven years later, to identify each leak. I feel certain that most of the leaks, and in any event the principal leaks, were the subject of discussions and expressions of concern by me and others involved in policy formulation.

—an article in the *New York Times*, February 3, 1969, entitled "U.S. Will Accept French Proposal on Mideast Talks", giving details of the NSC meeting February 1.

—an article in the *Washington Post*, February 3, 1969, entitled "US Backs Big 4 Move in Mideast".

—an article in the *Washington Post*, February 26, 1969, entitled "War Review Seen as Highly Optimistic", discussing an NSC study of the Vietnam War.

—an article in the *New York Times*, March 27, 1969, entitled "Nixon is Pressed to Decide on Aid", and an article in the *Washington Post*, March 28, 1969, entitled "Nixon to Seek More Foreign Aid, Agency Reorganization". Both articles discuss a recently completed NSC study.

—an article in the *New York Times*, April 4, 1969, entitled "President Nixon's Decision and Dilemma", discussing possible troop withdrawals from Vietnam.

—an article in the *New York Times*, April 6, 1969, entitled "Nixon has Begun Program to End War in Vietnam", discussing what the author calls "an essentially secret program of diplomatic and military measures designed to extricate the U.S. from Vietnam".

—an Article in the *Washington Post*, April 7, 1969, entitled "Laird's Trip to Vietnam Sets the Stage for Rapid U.S. Troop Withdrawals".

—an article in the *Washington Post*, April 8, 1969, entitled "Laird, Kissinger Approaches Affect President's Peace Plan".

—an article in the *New York Times*, April 9, 1969, entitled "US Bases Abroad Stir a New Debate" describing the conclusions of a secret study regarding United States' overseas military bases.

—an article in the *New York Times*, April 14, 1969, entitled "Soviet Missile Deployment Puzzles Top

U.S. Analysts", discussing results of U.S. satellite reconnaissance.

—an article in the *Washington Post*, April 14, 1969, entitled "Presidential Brothers Can be a Pain", subtitled "Doubtful AMB", discussing doubts in the Pentagon about the U.S. ABM program.

—an article in the *New York Times*, April 17, 1969, entitled "Readiness of U.S. Fast Reaction Forces in Korea is Stepped Up", discussing the U.S. strategy in the wake of the downing of reconnaissance plane.

—an article in the *New York Times*, April 22, 1969, entitled "A Series of Limited Pacts on Missiles Now U.S. Aim", discussing the U.S. strategic arms policy in relation to the Soviet Union.

—an article in the *New York Times*, April 24, 1969, entitled "Paris Peace Talks Said to be Stalled".

—an article in the *New York Times*, April 24, 1969, entitled "Posting of U.S. Intelligence Ship off Korea Believed Under study", discussing further U.S. reaction to the shooting down of reconnaissance plane.

—an article in the *Washington Star*, April 25, 1969, entitled "President Could 'Arm' Safeguard After Firing".

—an article in the *Washington Post*, April 27, 1969, entitled "U.S. Unit Repulses Attackers", discussing U.S. military policy towards Cambodia.

—an article in *New York Times*, May 1, 1969, entitled "Administration Gets Study of Global Nuclear Strategy", accurately summarizing a study of our strategic forces prepared in connection with SALT.

—an article in the *New York Times*, May 6, 1969, entitled "Aids Say Nixon Weighed Swift Korea Reprisal discussing the U.S. response to the shooting down of a Navy reconnaissance plane.

—an article in the *New York Times*, May 6, 1969, entitled "Safeguard's Cost was Overstated".

(10) Did the question of who had access to the material which was leaked come up at these meetings? If so, was the name of Morton Halperin discussed in connection with access to this material?

Response: I am certain that access to materials was discussed at meetings or in conversations concerning leaks, although I cannot recollect specific meetings or their dates. Discussions certainly would have been occasioned by each new major leak. Likewise, I am quite certain that the name of Morton Halperin was discussed in connection with access to various materials in discussions with President Nixon, General Haig, possibly the Attorney General, and probably Director Hoover. It is possible that the access of Morton Halperin to a broad range of NSC materials could have been raised in such discussions. I do recall several discussions with General Haig as to who had access to materials that were leaked.

(11) Please indicate each place in your testimony before the Senate Foreign Relations Committee, reproduced in U.S. Senate Com. on For. Rel., 92d Cong. 2d Sess., Hearings on Dr. Kissinger's Role in Wiretapping *("Hearings") at which the name Morton Halperin is deleted. Please also indicate any place in which material referring to Mr. Halperin or the surveillance of Mr. Halperin is deleted and indicate what the substance of that deletion is.*

Response: Set forth below is a list of the places in my testimony before the Senate Foreign Relations Committee, reproduced in "Hearings before the Committee on Foreign Relations, United States Senate, Ninety-Third Congress, Second Session, on Role of Dr. Henry A. Kissinger in the Wiretapping of Certain Government Officials and Newsmen," at which the name or any mention of Morton Halperin is deleted, together with the text of the deleted material. This list was prepared from confidential transcripts of the relevant testimony furnished to me by the Senate Foreign Relations Committee for the purposes of this response. Such transcripts include only my own testimony and not the remarks of others.

Page No. of Hearings	*Line No.*	*Text of Deleted Material Requested*
p. 176	25	. . . .and Halperin
p. 182	15	Halperin
	19	Halperin
	22	Halperin
	23	Halperin
	39	(1) Halperin (2) he falsified a passport application with respect to his connection with his contacts with Soviet citizens.
p. 182	40	not reported on a passport application a visit to the Soviet Union that he had made previously.
	41	Halperin
p. 183	1	(1) Halperin (2) many travels
	2	forget to put down every last trip that he had taken over the requisite period.
	5	Halperin
	35	Halperin
p. 184	8	Halperin
	12	Halperin
p. 185	38	(2) Halperin
p. 186	1	Halperin
p. 193	37	In the case of one other person, we gradually separated him from a classified documents job to such a point he felt he wanted to resign, but this was an attempt on my part to minimize the damage to the individuals themselves.
p. 216	15	(2) Halperin
	20	(1) Halperin
p. 331	40	Halperin

Page No. of Hearings	*Line No.*	*Text of Deleted Material Requested*
p. 332	1	Halperin
p. 332	5	Morton Halperin
	11	discovered as the source of the information
	18	Halperin
p. 338	22	(2) by Mr. Halperin
p. 219	32	(1) Halperin
	38	(2) Halperin
p. 222	19	(1) Halperin
p. 223	22	Beginning in May of 1969, Mr. Halperin was denied access to some of the most sensitive information. After a few months he became dissatisfied and indicated that he wished to leave the NSC staff. Since the information developed through the taps regarding Halperin indicated indiscretions on his part, not blatant breaches of security, and since it seemed to me that he could perform worthwhile work in defined areas, he was retained as a consultant.

(11 A) On page 182 of your testimony, please identify which of the paragraphs concern Dr. Halperin and provide all of the information provided to the Committee at that point about Dr. Halperin. Please indicate the basis for the information reported to the Committee at that time.

Response: The third full paragraph of my testimony on page 182 concerned Halperin. The sixth paragraph of my testimony on page 182 also included Halperin as one of the individuals referred to. The tenth full paragraph concerned Halperin. The text of that paragraph without deletions, reads as follows:

> "In the case of Halperin there was an FBI allegation that he falisfied a passport application with respect to his connection with his contacts with Soviet

citizens and that he had not reported on a passport application a visit to the Soviet Union that he had made previously. This was the range of allegations that was made about Halperin."

The basis for the information reported to the Committee at that time was data furnished to me by the NSC or FBI security personnel.

(12) Please identify all places in which the names Helmut Sonnenfeldt, Daniel Davidson, Robert Pursley and Henry Brandon are deleted from the text of your testimony reprinted in the "Hearings". Please provide any deleted testimony related to the decision to institute surveillance of Daniel Davidson, Helmut Sonnenfeldt, Henry Brandon and Robert Pursley, excluding the discussion of the institution of the second surveillance of Helmut Sonnenfeldt and any statement of the content of overheard conversations.

Response: Federal defendant Kissinger objects to responding to this interrogatory on the grounds that it is not relevant to the litigation since none of the third persons mentioned is a party to the litigation. Further, to respond to this interrogatory would constitute an infringement of the right of privacy of the third persons.

(13) In your testimony before the Senate Foreign Relations Committee on September 17, 1973, as reprinted in Statement of Information of the House Judiciary Committee, Book VII, p. 149, you state that the first discussion that you participated in or knew about regarding the possibility of electronic surveillance occurred on the day on which the New York Times *published the Beecher story concerning the bombing of Cambodia, which would have been May 9, 1969. Please indicate whether it is still your testimony that that was the first day on which you heard any discussion of the possibility of electronic surveillance. If that is no longer your belief, please specify precisely what documents you consulted or what conversations you had which led you to change your belief that you participated in no such conversations or discussions prior to the date of the Cambodian bombing leak.*

Response: As I stated before the Senate Foreign Relations Committee on July 23, 1974, the record-keeping system in my office was erratic and not developed in my initial months in Washington. Subsequent to my testimony in September, 1973, I consulted White House logs, which established that I left Washington on May 7, 1969 for Key Biscayne, Florida, and did not return until May 11. Since my recollection is that the meeting at which the wiretap program was initially discussed and authorized took place in the Oval Office, it could not have occurred on May 9. The meeting most likely occurred on April 25, as more fully stated in response to Question 14. Insofar as I can recall, the Oval Office meeting was the first day on which I heard any discussion of the possibility of electronic surveillance.

14. In your testimony before the Senate Foreign Relations Committee on July 23, 1974 (Hearings p. 171) you stated that some time in April 1969 you were called into a meeting then going on in which the Attorney General, Mr. Hoover, and the President were present and that you were told that wiretaps would be conducted in order to identify leaks and that you were to cooperate by supplying the names of key individuals having access to sensitive information which had leaked. Please identify as precisely as you can when and where this meeting took place, and on the basis of what documents and conversations you were led to this conclusion. Specify precisely what was said at that meeting.

Response: As I testified before the Foreign Relations Committee, in the early days of the Administration, systems of logs and memoranda of meetings were erratic and not developed. I have not been able to confirm by any documents the time of the meeting in question. However, it appears that this meeting most likely occurred on April 25, 1969. On that day (according to White House, F.B.I. and Department of Justice logs) the Attorney General and Mr. Hoover were at the White House before leaving with the President by helicopter for dinner at Camp David. I was at the White House all day and did not go to the Camp David dinner.

The meeting took place in the Oval Office at the White House. It was in progress when I was called in. President Nixon, Mr. Mitchell and Mr. Hoover were present. I was informed, I believe by the President, that the problem of leaks was being discussed. I was told that the President had decided to go back to the previous practice of using wiretaps as the most effective means of discovering leaks. I was also told that three categories of individuals would be subject to wiretaps: those with unfavorable information in their security files, those who had access to information which had leaked, and those whose names appeared as sources or recipients of leaked information in FBI investigations, including wiretaps. These categories were established, insofar as I know, as a result of discussions among the President, the Attorney General and Mr. Hoover. I was asked to supply the names of key individuals having access to sensitive information which had leaked. I was informed that the practice and procedures for such a wiretap program were well-established. There was some discussion of procedures and of candidates for electronic surveillance. Director Hoover identified four persons as security risks and suggested that these four be put under surveillance initially. Three of these—Morton Halperin, [A], and [B]—were individuals who had been previously identified as representing potential security problems. The fourth was [C], whom Hoover claimed had connections with foreign intelligence services, and had been tapped in previous Administrations. I believe the Director also recommended physical surveillance of [D]. It was my understanding that President Nixon directed surveillance of the persons then suggested by Director Hoover.

In the course of the meeting I was assured that the wiretap program envisioned was entirely lawful in the opinion of the Attorney General and that the Bureau had established procedures for such a program. Director Hoover assured President Nixon that wiretapping in similar situations had been a common practice in previous Administrations and confirmed that procedures were well established and that there was no question as to legality.

With respect to persons not identified by name, see objections to Interrogatory 2 and Interrogatory 12.

15. You stated in your July 1974 testimony (p. 176) that at the "April" meeting referred to in the previous question, Mr. Hoover suggested four persons who should be put under surveillance and that three of them were members of your staff considered security risks by Mr. Hoover. Please identify these four individuals. Was one of them Morton Halperin? Did Mr. Hoover state on what basis he believed that these individuals to be put under surveillance were security risks?

Response: The four individuals suggested by Mr. Hoover were Morton Halperin, [E], [F] and [G]. Except as mentioned in the response to Question (14), I do not recall whether, at the meeting in the Oval Office, Mr. Hoover stated the particulars as to why he believed the respective individuals were security risks.

With respect to persons not identified by name, see objections to Interrogatory 2 and Interrogatory 12.

16. If Morton Halperin was one of the three individuals referred to by Mr. Hoover as security risks, did Mr. Hoover state any information that led him to this belief? If so, what was the information? Did you at that time challenge or support or make any other comment upon Mr. Hoover's assertion that Mr. Halperin was a security risk? Had Mr. Hoover made any other statement to you concerning Mr. Halperin's security status? Did you ask Mr. Hoover or the FBI to specify what information led him to the judgment that Mr. Halperin was a security risk? Did you ask him to relate that judgment to the material contained in the FBI investigation of Morton Halperin that had been provided to you by the FBI.

Response: Soon after I hired Mr. Halperin, I became aware that the FBI had questions concerning Mr. Halperin's security status. I asked General Haig to review the files and, based upon General Haig's report of those files, I continued the employment of Mr. Halperin. I do not recall my debate with Mr. Hoover as to the merits of his or the FBI assessment of Mr. Halperin's security status.

I would assume that Mr. Hoover based his judgment on the material in Mr. Halperin's security files, although there may have been other reasons for his judgments.

17. You testified that the three individuals were ones against whose employment the FBI had recommended "either because of security information in the files or information which was not formally in the files." (p. 176) Please specify precisely when and where the FBI recommended against the employment of Morton Halperin. Explain what information in the files or "not formally in the [FBI] files" was shown to you or discussed with you in this connection? By whom? Please reconcile your testimony with the FBI and NSC security files for Mr. Halperin which contain no such recommendation.

Response: Russell Ash, who acted as National Security Council liaison with the FBI, discussed with me in January 1969 the security records of the persons I had hired or proposed to hire. At that time he briefed me on the security records concerning Mr. Halperin and stated that there was adverse information of record concerning Mr. Halperin that he felt should be brought to my attention. My recollection is that Mr. Ash recommended against hiring Mr. Halperin. I directed General Haig to review the security files and report to me. In any event, I approved a Top Secret security clearance for Mr. Halperin. I do not recall the particulars of any discussion I may have had with others concerning the information then available relevant to giving Mr. Halperin a Top Secret security clearance.

18. In your testimony you state that Morton Halperin had unfavorable information in his files. (P. 132) Please examine the files as they have been provided to the plaintiffs and identify that information which you or anybody else considered unfavorable. If any such information is not in the files provided plaintiffs, please state what it is, and make it available.

Response: As noted in my response to Question 17, I do not recall personally reviewing Mr. Halperin's security files, but I was briefed on them, and my testimony referred to in the above question was based on briefings

given to me. I note in the material now furnished to me that the following two items might be regarded as unfavorable, although, as I have stated repeatedly, I did not consider the information I then received as sufficiently unfavorable to warrant denial of employment and Top Secret clearance to Mr. Halperin.

Item 1

A memorandum from W.C. Kiker to the Assistant Secretary of Defense (Administration), dated July 9, 1968 notes, regarding Halperin's failure to report a visit to Greece, Yugoslavia and the Soviet Union: "This omission seems rather strange in view of the listing of all the other countries visited and would appear to be a serious omission on a statement of Person. History leading to access to sensitive information."

Item 2

A document entitled "Memorandum for the Record", dated July 10, 1968, states as follows, in part: "Subject is in a position where compliance with AI–64 is extremely essential. Subject was not completely candid in the submission of his SPH on 17 August 1966 concerning his travels abroad. He appears to have a carefree attitude concerning his obligations under AI-64 in that he did not advise the Security Division of his error in identification of who he had lunch with on 29 December 1967. There is no indication at this point what other possibile contacts he has had with Soviet or Satellite Nationals since he has been with OSD, which he might consider as insignificant".

19. You testified further (p. 176) that you had hired the three individuals Mr. Hoover opposed, including apparently Mr. Halperin, overruling "the security man on your staff." Please identify who this individual was, and when and how he made the recommendation that Mr. Halperin not be hired, and on what basis he made that recommendation. If "the security man" is Russell Ash, please reconcile this statement with Mr. Ash's handwritten note of

March 3, 1969, in Mr. Halperin's NSC security files which does not recommend against hiring Mr. Halperin.

Response: As stated in my response to Questions I (c) and 17, Russell Ash was the security man on my staff and briefed me on Mr. Halperin's security files in January 1969. I am not in any position to reconcile Mr. Ash's illegible handwritten note of March 3, 1969, with his briefing to me in January 1969. My testimony about "over-ruling the security man" on my staff refers to the fact that there was adverse information of record and that he advised that doubts should be resolved against clearance. I mention again that, despite FBI opposition in January 1969, I nevertheless hired Morton Halperin and continued his employment.

20. You testified that the only people identified by Mr. Hoover at these meetings as potential leakers were those previously identified by Mr. Hoover as security risks who were hired over his objections. (p. 133) If this included Morton Halperin, did Mr. Hoover state at this meeting that Mr. Halperin had been hired over his objections?

Response: With respect to the identification by Mr. Hoover of potential leakers at the Oval Office meetings, see the response to Question 14. I do not recall whether or not Mr. Hoover stated at that meeting that Mr. Halperin had been hired over his objections.

21. You stated at your Salzburg press conference that three of the four people first tapped who were on your staff were hired by you "over the strong objection of all of my associates." Please identify which associates you had in mind and where and when and in what form they made known to you their objections to hiring of the three individuals and specifically of Mr. Halperin. (Text in "Hearings" at p. 6).

Response: In my Salzburg press conference, I was speaking broadly and in general terms. Insofar as the statements related to Mr. Halperin, it is, I think, fair to say that not only was his employment in a particularly responsible and sensitive position objected to on grounds of security, but also on grounds of compatability. Also Mr.

Halperin was associated with previous Administrations and in other Departments, and I was informed he had been the subject of controversy. For certain particulars, see the response to Question 1(c). Nevertheless, as previously mentioned despite knowledge of general opposition to my doing so, I did hire Mr. Halperin.

22. In your testimony you state that three or four of those tapped were tapped because "they were the only ones who could be identified at the time of the original decision as potential leaks or security problems" by Mr. Hoover. (p. 132) Please identify when this "original decision" that you refer to in that sentence was made, who was present, and on what basis the judgment was made that these individuals were the only ones who were potential leakers or had security problems. Please indicate if you concurred in this judgment. Please identify the three individuals that you refer to.

Response: The "original decision" referred to was made at the Oval Office meeting in April 1969, more fully described in my response to Question 14. President Nixon, Mr. Hoover, Attorney General Mitchell and I were there. Messrs. Halperin, [H], [I] and [J] were the individuals suggested by Mr. Hoover. My understanding was that the first three mentioned were not necessarily the only potential leakers, but were those considered by Mr. Hoover as most likely suspects along with [K].

Everyone who had access to the leaked information was a "potential leaker," including myself. Messrs. Halperin, [L] and [M] were the only NSC staffers whose security files presented problems, insofar as I recall.

With respect to persons not identified by name, see objectives to Interrogatory 2 and Interrogatory 12.

22 A. [sic] Were you ever criticized by any government official prior to May 9, 1969, for hiring Morton Halperin? Did you ever hear indirectly that you had been so criticized? If so, give details of date, person, place and substance of statement.

Response: I cannot recall details of dates, persons, places or substance of all such statements that might have

been made to me or that I might have heard critical of my hiring Morton Halperin. For further details, see the responses to Questions 1(c) and (21).

23 B. Did you ever state to John Ehrlichman that you wished to fire or wished you could fire Morton Halperin? Did you ever state to Mr. Ehrlichman of anyone else that Mr. Halperin was "singularly untrustworthy", or that he was a "carryover" from the previous administration? If so, when, where, who else was present and what was said. If not, do you have any explanation for the testimony given by Mr. Ehrlichman at pages 13 and 8 of his deposition: (not yet filed).

Response: I do not recall stating to Mr. Ehrlichman or anyone else that Mr. Halperin was "singularly untrustworthy" and certainly could not have made such a statement in 1969–70. I could have stated that he was a "carryover" from the previous Administration which, of course, generally speaking, was the fact. I do not attempt to explain, amplify or deny Mr. Ehrlichman's deposition.

23 C. Did Mr. Nixon ever state to you that Morton Halperin was disloyal to him or to the country? If so, when, where, who else was present, on what was the statement based, and what was said?

Response: I do not recall such statement.

24. Was it ever represented to you that Mr. Nixon has made a statement as described in question 23C. If so, give details.

Response: Not that I recall.

25. If as you told the Senate committee the "April" meeting was held following some serious leaks, why was it that the program was to go into effect only on the date of the first significant leak thereafter? (Hearings, p. 171) If the surveillance program was to go into effect at the time of the next leak, following the meeting which you say took place on April 25, why did it not go into effect when the EC-121 leak was printed on May 6, 1969? If it was the case that the surveillance was to go into effect at the time of the next significant leak, were you or was anyone else

desig[illegible]d by Mr. Hoover to advise Mr. Hoover of whether such a leak occurred? Is it not the case that Mr. Hoover himself would not be aware of whether a newspaper story related to foreign and military power constituted a leak as opposed to the provision of material to the press by senior officials authorized to do so.

Response: My understanding of the April meeting was that an electronic surveillance program was authorized by the President, and that Mr. Hoover, when he thought this method appropriate, could use electronic surveillance on persons within the categories that had been established; as stated in response to Question 14. I have no recollection that a particular time for beginning the actual wiretaps was discussed. I was not designated to inform Mr. Hoover of the first significant leak. In view of the President's authorization, Mr. Hoover evidently chose to institute the wiretaps after my calls to him on May 9, regarding the national security significance of the Beecher story in the *New York Times* of the same date.

26. You stated in your July 23rd, 1974 testimony (p. 176) that at a meeting on April 25, 1969, four names were "established based on the recommendations of the Director of the FBI. Explain what you mean by established. Did the President specifically authorize wiretaps of these individuals at that meeting? At any other time? You testified that the wiretaps were to be on three of "your people" and one journalist. Were the three of your people Morton Halperin, Helmut Sonenfield [sic] and Daniel Davidson? Was the one journalist Henry Brandon? (Hearings, p. 176).

Response: The subject matter of Question 26 is covered by prior questions, and for the response to Question 25, please refer to responses to such questions.

27. You testified further that the Director of the FBI recommended at the "April" meeting that three individuals on your staff in case of leaks should be subjected to wiretapping. (P. 177). Since leaks had already occurred at the time of the meeting, what is the meaning to the phrase "that in case leaks occurred, they should be subjected to

wiretapping." Did this indicate that surveillance of them was authorized only if leaks occurred of information to which they had access?

Response: I do not attach any particular significance to the phrase missquoted in Question 27. The wiretapping program was authorized as stated in the responses to previous questions and became operative some days later.

28. In your testimony (Hearings, p. 182) you state that the three people selected–apparently Halperin, Sonnenfeldt and Davidson–were identified by the FBI as potential leakers. Was this based on an analysis of the particular leaks and who had access to that information? Did you discuss with the Director of the FBI whether any one of the three people had access to any of the leaked information?

Response: I do not recall any analysis of particular leaks and access to information in relation to Mr. Halperin. At that time Mr. Halperin had access to the entire gamut of NSC activities. I do not recall any particular discussion with the Director of the FBI as to the access of Mr. Halperin to any particular leaked information. In his telephone conversations with me on May 9, 1969, and in his letter to me of May 13, 1969, Director Hoover identified Mr. Halperin as a possible source of the leak then being investigated by the FBI.

29. With regard to the affidavit filed by you in Ellsberg v. Mitchell, *et al, (reprinted H. Jud. Comm. Statement of Information on Behalf of Pres. Nixon, Bock IV, P. 143) [sic] please indicate whether the explanation of the origin of surveillance of Mr. Halperin contained in paragraph 7 and 8 of that document is still your view of how the surveillance began. If it is not, please explain when you changed your position, on the basis of consultation of what documents, and what conversations?*

Response: I affirm the statements in paragraphs 7 and 8 of my affidavit referred to in Question 29, except that I now believe that the meeting I referred to occurred in April rather than early May as mentioned in my response to Question 14.

30. For each leak mentioned in your affidavit, please indicate whether Mr. Halperin had access to the information in the leak stories.

Response: While I cannot be certain, I believe Mr. Halperin had access to the information in the leaked stories mentioned in my affidavit referred to above.

31. With reference to the leaks which occurred after Mr. Halperin left the government and which were based on information developed in the government after Mr. Halperin's departure from the government, please explain the relevance of these leaks to the continuation of the electronic surveillance of Mr. Halperin.

Response: I do not know that there necessarily was any such relevance. I assume that leaks which occurred after Mr. Halperin left the government and which were based on information developed in the government after Mr. Halperin's departure, and as to which Mr. Halperin could not have had access through has contacts with former associates on the National Security Council staff and elsewhere in government, were not relevant to the continuation of the electronic surveillance on Mr. Halperin. However, because of his position as Chief of the National Security Council Planning Group, Mr. Halperin received extensive exposure to classified information in many areas including Southeast Asia and the SALT negotiations, much of which remained classified long after Mr. Halperin left the government. I do not know whether or not leaks of classified information in these and other areas occurring after Mr. Halperin left the government would be relevant to the continuation of his surveillance. I had no occasion to address specifically the continuation of the program.

I am not in a position to know Mr. Halperin's sources of information after he left my staff. I ceased to follow the electronic surveillance program after May 12, 1970, except with respect to some specific situations that might have been brought to my attention.

32. In the affidavit described in interrogatory 29, you stated that since the leaks continued the surveillance continued. Please explain the meaning of that sentence in

light of the fact that Mr. Halperin did not have access to the information which leaked after he left the government.

Response: The above statement with respect to my affidavit is incorrect. In that affidavit stated, in paragraph 10, that "notwithstanding the investigation . . . being conducted by the FBI and additional governmental efforts to curb the unauthorized disclosure of classified information, press leaks . . . continued through 1969, 1970 and 1971."

33. What was the subject of your May 5, 1969 meeting with Mr. Hoover in his office? Did you discuss leaks or electronic surveillance? Did you discuss Morton Halperin? If so, give details.

Response: I have no recollection of such meeting.

34. In your several May 9th telephone conversations with Mr. Hoover regarding the Cambodian bombing leak, did you or he make any references to any previous discussions related to leaks, the loyalty of your staff, or wiretapping with Mr. Nixon or to any prior authorization to begin an electronic surveillance of Mr. Halperin? If not, why not?

Response: I do not recall the particulars of my telephone conversations of May 9, 1969, with Mr. Hoover, other than as set forth in the several memoranda he wrote concerning them, which I have seen. I do not recall any discussion of wiretapping. At that time, my understanding was that the wiretapping program had been authorized and that, therefore, Mr. Hoover or his staff had the right to use wiretapping in their investigations. I do not recall any discussions as to when the program would actually be put into effect. I called Mr. Hoover at President Nixon's request, to express the President's and my concern about the seriousness of the leak appearing that date and to request an immediate investigation.

34 A. In those May 9th conversations did Mr. Hoover indicate in any way that the FBI was about to begin wiretapping in the Halperin home telephone on May 9, 1969?

Response: He did not.

34. B. Did you intend your May 9 request to Mr. Hoover to investigate the Cambodian bombing leak to be a request to him to conduct electronic surveillance of any or all individuals that he considered as possible sources of the leaked information? In light of the prior meetings between you, Mr. Nixon, Mr. Hoover and Mr. Mitchell, would it have been reasonable for Mr. Hoover to have interpreted your May 9 request as a request for electronic surveillance?

Response: As stated in the response to Question (34), I requested Mr. Hoover to investigate the leak appearing in the Beecher article of May 9. I did not request any particular method of investigation. In this respect, I think Mr. Hoover's memoranda of May 9 fairly reflect my request.

35. Did you take Mr. Hoover's remarks to you on the telephone on May 9th (as distinguished from whatever conclusions you may have drawn from his May 13th letter) to indicates that he had begun an electronic surveillance of Mr. Halperin or anyone else?

Response: I did not.

36. Please identify all conversations with any persons which you had on May 9–12, 1964 (apart from the May 9th conversations with Mr. Hoover), regarding the May 9th leak of the Cambodian bombing story. For each conversation indicate whether it was in person or by phone, who was present or participated, and what was discussed. If you cannot distinguish specific conversations, indicate generally with whom you discussed the leak of May 9th, and what the content of those conversations were.

Response: I most certainly discussed the Cambodian bombing leak with President Nixon and undoubtedly discussed it with my associates who were then with me in Key Biscayne, including Messrs. Haig, Halperin, and Eagleburger. Before I telephone Mr. Hoover on May 9, I had discussed the leak with the President who requested that steps be taken urgently to find the source of the leak.

We were principally concerned that the leak would provide an excuse for North Vietnam to expand its operations in Cambodia. As nearly as I can recall, I think I reported to Messrs. Halperin and [A] that Mr. Hoover had suggested to me that one of them might be the source of the leak.

I may have had conversations with Attorney General Mitchell concerning the Beecher story, as he was at that time also in Key Biscayne, although I do not specifically recall such a conversation.

With respect to persons not identified by name, see objections to Interrogatory 2 and Interrogatory 12.

37. Did you in any conversation with Mr. Nixon on Mr. Mitchell discuss whether the May 9th story was a leak which should trigger an electronic surveillance program pursuant to an earlier decision. If no, why not?

Response: I do not recall any such conversation. There would have been no point to it. The necessary decisions had already been made.

38. (a) Did you on May 9th or May 10th ask Alexander Haig to prepare for you a list of those individuals who had access to the Cambodian bombing information? Did Colonel Haig prepare such a list? If so, was Mr. Halperin on it? Please identify all of the individuals who were on the list as far as you can remember.

Response: I do not recall requesting General Haig to prepare such a list.

(b) Whether or not such a list was prepared or discussed, who to your knowledge, had such access? To the extent you know of agencies in which personnel had such access but do not know individual names, please give an estimate of the number of such persons and who in the agency would be able to provide a fuller list.

Response: There were a number of persons who knew about the Cambodia bombing. They included the President, those in the military line of command who carried out the bombings, the Secretary of Defense, staff officers and other assigned to the project, persons in the White House Situation Room, the Chairman of the Joint Chiefs of

Staff and, in my office, General Haig, Messrs. Eagleburger, Halperin and probably Sneider.

39. Did you on May 9th or May 10th provide Colonel Haig with the names of Morton Halperin, Helmut Sonnenfeldt, Robert Pursley and Daniel Davidson and direct that he take those names to Mr. William Sullivan of the FBI? If so, for each individual please identify why he was included on the list. Did you instruct Colonel Haig to request surveillance of those four individuals? If so, by what authority did you direct Colonel Haig to make the request for surveillance to the FBI? If you gave Colonel Haig any other instructions with respect to the list, please state those instructions.

Response: Some time after the Oval Office meeting, I passed on to General Haig the decision taken and instructions given at that meeting, as stated in the responses to other Questions. I also gave him the four names selected at the Oval Office meeting. I may have talked with General Haig in Key Biscayne, and probably did, telling him that he should get in touch with Sullivan and furnish names as directed by the President I do not recall giving General Haig the name of [N]. It is likely, however, that [O's] name was forwarded to the FBI by General Haig because of his access to information which had been leaked. If so, General Haig and I probably had previously discussed [P's] access to leaked information.

With respect to persons not identified by name, see objections to Interrogatory 2 and Interrogatory 12.

Response: I do not recall whether General Haig reported to me his conversation with Mr. Sullivan.

40 A. Did you ever tell Colonel Haig that he was to tell Mr. Sullivan that the tap on Halperin or the taps in general would last only for a few more days?

Response: As stated in responses to previous questions, after the meeting in the Oval Office at which the electronic surveillance program was authorized, I discussed it with General Haig, particularly the role of my office in carrying out the program. I believe I indicated to General Haig my understanding that the program would last only a short

time. I do not recall discussing the duration of any specific surveillance.

41. If your understanding was that Mr. Hoover already had authority from the President to begin a surveillance of Halperin, Davidson, Sonnenfeldt and Brandon, why did you feel it necessary to direct Colonel Haig to bring three of these four names plus the name of Colonel Pursley to Mr. Sullivan.

Response: To the best of my recollection, the principal purpose of General Haig's first meeting with Mr. Sullivan was to establish liaison and to work out the parameters of the program and the role of my office. In addition, as I indicated in response to Question 39, a further purpose of the meeting may have been to reconfirm to Sullivan the names selected at the Oval Office meeting and that [S] may also have had access to leaked information.

With respect to persons not identified by name, see objections to Interrogatory 2 and Interrogatory 12.

42. If you interpreted Mr. Hoover's telephone conversations with you of May 9th, to indicate that he would undertake an electronic surveillance of Mr. Halperin, why did you feel it necessary to direct Colonel Haig to bring Mr. Halperin's name to Mr. Sullivan and request a surveillance on May 10th?

Response: I did not so interpret Mr. Hoover's telephone conversations with me on May 9.

43. (a) When and how did you first learn that a wiretap had in fact been placed on the Halperins' telephone?

Response: I do not recall. I probably learned about the tap at the time of the first report to me of information gathered therefrom.

(b) On learning that fact, did you form any conclusion as to the legality of the tap?

Response: The Attorney General had explicitly advised that electronic surveillance with respect to the national security leaks was entirely legal. It never occurred to me, upon learning that a tap had been placed on Mr. Halperin's

telephone, to question the legality of that tap or the program authorized by the President.

(c) If yes, what was that conclusion?

Response: Not applicable.

(d) If you concluded the tap was legal, state the basis for that conclusion.

Response: I did not make any further conclusion at that time. See previous responses as to advice given by the Attorney General and Mr. Hoover.

(e) Did you ever from Jan. 21, 1969, to Feb. 12, 1971, discuss the legality of this or similar taps with any person?

Response: Yes.

(f) If yes, with whom, when and what was said?

Response: With President Nixon, Attorney General Mitchell and Director Hoover as stated in the responses to previous questions.

(g) Did you ever see any written statement addressing or in any way referring to the legality of this on similar wiretaps?

Response: I do not recall any written statements or opinions concerning the legality of these wiretaps during the period when they were in effect.

(h) Did you ever ask anyone for advice on the legality of this or similar wiretaps?

Response: No, except as stated in response to previous questions.

43(sic)A. (a) Please state the time, circumstances, and substance of any "assurances of the Attorney General as well as the Director of the FBI that the practice [of wiretapping] *had been employed in all prior administrations since 1940, that the Department of Justice had long-established procedures for the initiation and control of wiretaps and that the program was lawful." (Hearings, p. 171.)*

Response: These assurances were given as mentioned in response to previous questions.

(b) Were you aware that the usual "procedures for the initiation and control of wiretaps" would not be employed in this case pursuant to Colonel Haig's instructions? If so, please summarize any discussion of the effect of that fact on the legality of the tap.

Response: No

(c) If any basis was given for the assurance that "the program was lawful" please state what it was, who gave it and when.

Response: See responses to previous questions.

44. (a) Who (other than Messrs. Nixon, Mitchell, Ehrlichman, Haldeman, Haig and Sullivan) knew that a tap had been placed on the Halperins' phone?

Response: Most certainly Mr. Hoover knew that a tap had been placed on Mr. Halperin's line as well as those concerned with the operations in the FBI and the Department of Justice. Secretaries and other members of my staff may well have known of one or more of the taps.

(b) Did you ever tell anyone other than those persons.

Response: I have testified at length concerning the taps and have given press conferences on the subject.

45. Please describe any conversations which you had on or after May 10, 1969, in which the wiretap program in general and specifically the wiretap of Dr. Halperin was discussed. Specifically, please identify all meetings at which you discussed the wiretap with William Sullivan, J. Edgar Hoover, John Ehrlichman, H.R. Haldeman, Alexander Haig, or Richard Nixon. For each meeting, identify as precisely as you can, who was present and what was discussed.

Response: I cannot describe with particularity all conversations I might have had on or after May 10, 1969, in which the wiretap program in general and specifically the wiretap of Mr. Halperin was discussed. During the course of the program, I undoubtedly discussed it from time to time with President Nixon, the Attorney General, Mr. Haldeman, and General Haig. I do not recall, however, particular discussions concerning the wiretap of Mr.

Halperin other than as stated in the responses to this and other questions. Since the public disclosure of the program, I have, of course, discussed it publicly and with many people and have testified before the Senate Foreign Relations Committee with respect to the wiretap on Mr. Halperin.

From late April, 1969, until about May 15, 1970, I had occasional discussions with General Haig concerning the operations of the program, certain information acquired therefrom and persons within the NSC staff who had access to sensitive information.

I did discuss the wiretap program and its results from time to time with President Nixon although I do not recall the precise dates or specific conversations. I recall a continuing concern on his part, as well as on my part, with the leaks that occurred notwithstanding all the efforts that were being made to stop them.

I met with Mr. Hoover on June 4, 1969, and expressed to him my view that the taps in general should be stopped as soon as possible. General Haig had prepared talking points for me for use at this meeting and may have attended the meeting with me.

During the Spring of 1970, it became clear to me that I was in no position to take any action with respect to the occasional wiretap summaries that I received. I pointed out on a number of occasions to President Nixon that my office would serve best if it concentrated entirely on foreign policy matters and if internal security matters were handled elsewhere. Subsequently, in May 1970, I was informed by Mr. H. R. Haldeman that the President had decided that Mr. Haldeman would handle the White House involvement with the wiretap program in the future. After that transfer occurred, although I do not recall with particularity any conversations between Mr. Haldeman and myself regarding the wiretap program, he may occasionally have brought to my attention matters which he considered relevant to the NSC staff.

After May of 1970, informal liaison was maintained between General Haig and Mr. Sullivan of the FBI. Mr. Sul-

livan would, I understand, call up General Haig if he had information of sufficient gravity. It is possible that General Haig informed me of such calls on one or two occasions.

As I testified before the Senate Foreign Relations Committee my logs show that I had a meeting with Mr. Mardian on August 5, 1971. Mr. Mardian wanted to check to see what documents I had relating to the wiretap program. I turned him over to General Haig, and I was told that he did review whatever records my office then had relating to the wiretap program.

46. Did you on May 20, 1969, visit William Sullivan's office? Did you then examine wiretap logs or other papers related to wiretapping? If so, please provide your recollection of what was discussed and what papers you examined when you visited Mr. Sullivan's office. If you do not recall such a visit, do you have any information to indicate that Mr. Sullivan's memorandum dated May 20, 1969, about such a meeting, is inaccurate? Please review Mr. Sullivan's May 20, 1969, letter to Mr. Hoover and confirm or deny the accuracy of his report of each statement attributed to you. If you are confident no such visit took place, please so state. In that case, please state why Mr. Sullivan wrote Mr. Hoover that it took place.

Response: I have no recollection of having visited Mr. Sullivan's office at any time. I have read what is alleged to be a letter from Sullivan to Mr. Hoover dated May 20, 1969, which does not revive any recollection. I cannot, therefore, conform or deny the accuracy of his report nor why, if he wrote the report, he did so.

47. Please identify the conversations referred to in the "talking points" prepared by Colonel Haig for your meeting with Mr. Hoover on June 4, 1969, in which Colonel Haig indicates that you had discussed the wiretap program with Mr. Nixon and with Mr. Ehrlichman and Mr. Haldeman. Please identify and give details of the conversations referred to. If you do not recall any such conversations, please state whether you believe Colonel Haig would have indicated to you that such conversations by you took place if they did not.

Response: I do not recall and cannot identify the particular conversations referred to.

48. Please state your recollection of what was discussed at the meeting with Mr. Hoover for which the talking points were prepared.

Response: I do not recall the details of the conversation I had with Mr. Hoover on June 4, 1969. I assume that I followed the talking points that were prepared. What else was said in this conversation would be impossible for me to reconstruct now.

48. A. Please examine Colonel Haig's "talking points" for that meeting, and indicate whether you made the statement he suggested. Please identify the handwriting in the upper right hand corner. Please indicate whether you have made or caused to be made any search of a file marked "wiretapping" and the results of such search.

Response: I do not recall whether I made the exact statement called for by the talking points. I cannot identify the handwriting in the upper right hand corner. I am advised that there is not any file in the NSC entitled "wiretapping."

48. B. How were the summary letters addressed to you by Mr. Hoover received and handled in your office? Who gave them to you? Who had access to your desk during the time they were on your desk? Did David Young have any access? To whom did you give the letters after reading them? Where were they filed and by whom? Where are these files now? To the extent you did not know or recall the procedure for handling, please state who would.

Response: As I recall, the summaries were delivered to my office, probably to General Haig or his secretary. They were reviewed by General Haig who would call such of them to my attention as he believed appropriate. Occasionally he would put those he considered significant in my "in basket" and those that arrived there may or may not have been seen by me. Presumably, General Haig, my secretaries and those working closely with me from time to time had access to my "in basket" and would clean it out

occasionally. David Young was my appointments assistant from January 1970 to January 1971.

Letters received by me were returned to General Haig. I understand that the letters were returned to the FBI. Their travels since their return to the FBI have been the subject of much inquiry, but as to that I have no personal knowledge.

49. Please examine each FBI letter addressed to you containing information from the electronic surveillance of the Halperins and identify which of the letters you remember seeing before and when you saw it. Also please examine each letter to determine whether any notation on it indicates that you did or did not see the letter at the time. Specifically please examine the check mark which appears on a number of the letters and explain its meaning. Please also examine the initials HK which appear on some of the letters and indicate the meaning of those initials.

Response: As for the letters which are unmarked. I have no way of knowing whether or not I saw them. The letters which I did see, I probably saw within a day or two after their transmittal, but that I cannot recall with certainty. It has been my usual practice to mark memoranda that I have seen with my initials "HK". On the letter dated October 24, 1969, the initials "HK" may have been added by my appointments assistant on the presumption that I had seen the letter; it does not look like my handwriting. The check mark which appears on other letters may well have been written by me but I cannot be certain. The meaning of such notations is that I have seen the paper in question and have no further business with it and it can be filed or otherwise dispensed with. However, check marks are not my usual method of indicating I have seen a particular document or paper, and may have been added by my office staff simply to indicate that they had been on my desk and should not, therefore, be sent to me again.

50. Did you ever pass on the letters to Mr. Nixon? To anyone else? If so, please explain.

Response: I understand that the letters addressed to the President received by General Haig were in turn passed along by him to Mr. Ehrlichman's office. I do not recall any instance of my passing on any of these letters to President Nixon personally or to anyone else.

51. Did you ever discuss the content of any of the letters with Richard Nixon or with anyone else? If so, please identify each conversation, who was present and what was discussed.

Response: I discussed some of the letters with General Haig or he would brief me concerning them. I do not recall any discussions with President Nixon concerning particular letters, although there were such discussions. I think I also had occasional discussions with Mr. Haldeman, but with respect to which letters and concerning whom I cannot recall.

52. Did you ever see the letter from Hoover addressed to you dated Dec. 29, 1969 relating to a prospective article by Clark Clifford? Did you ever have any conversation with Colonel Haig or anyone else concerning that letter or action based on it?

Response: I do not recall ever seeing the letter referred to having any conversations with General Haig or anyone else concerning it or action based on it.

53. Did you give Colonel Haig or anyone else instructions about what should be done with the letters addressed to Mr. Nixon? If so, state what instructions you gave and to whom? Were you aware of the fact that the letters addressed to Mr. Nixon were delivered to your office? Do you know what was done with those letters? If so, describe the procedure.

Response: I do not recall any particular instructions given by me regarding the letters addressed to President Nixon.

54. Did you on May 9th, 1969, discuss the Cambodian bombing leak with Morton Halperin? If so, please relate as fully and precisely as you can the content of that conversation.

Response: I did discuss the Cambodian bombing leak with Morton Halperin on May 9, 1969, and I believe I told him that he was suspected of being the source of the leak. I probably told him of my conversation with Mr. Hoover but I cannot be certain.

55. Did you agree with Mr. Halperin that his access to the most sensitive material available to you would be cut off for a time in order to establish that he was not the source of leaks?

Response: I have seen Mr. Halperin's affidavit in this matter, sworn to November 12, 1973, in which he indicates that on May 9, 1969, I told him that for a period of time he would not be given access to more sensitive information so that if it leaked he could not be blamed. I recall such a conversation with Mr. Halperin and it could have been on May 9 or later. In any event, in May 1969, or soon thereafter, Mr. Halperin was denied access to some of the most sensitive information. Also, at about this time distribution of sensitive materials throughout the NSC was restricted. I may have also directed that particular materials be confined to specified people. Further, attendance at meetings became restricted, but I do not recall any orders at any time to cut off Mr. Halperin completely from all distribution of sensitive material. I probably told him from time to time what practices were being followed.

56. Did you see to it that Mr. Halperin's access to such information was in fact cut off?

Response: See response to Question 55.

57. Did Mr. Halperin's access to this information ever in fact resume?

Response: As stated in the response to Question 55, Mr. Halperin's access to information was at no time entirely cut off but remain restricted.

58. Please describe your conversations with Mr. Halperin beginning to July, 1969 related to his desire to resign from the staff of the National Security Council. Did you urge Mr. Halperin not to resign from the staff? Please state whether the FBI tape summary of your conversation

with Mr. Halperin of August 9, 1969, (a copy of which is an exhibit to General Haig's deposition) is substantially accurate.

Response: I had several conversations with Mr. Halperin during the summer of 1969 regarding his desire to leave the NSC and the position he should occupy within the Staff. I had high admiration for Mr. Halperin's ability and wanted to have him on my staff. However, it was my impression that he was not satisfied with the role I had given him and desired wider responsibility. Friction developed between Mr. Halperin and others on my staff and I was unable to work out an organizational arrangement which would satisfy Mr. Halperin and others concerned. During this period the organization of the NSC staff was more fully developed, with General Haig taking on the duties of my chief deputy and managing the day to day flow of materials.

While I do not recall the details of the conversation of August 9, 1969, I have no reason to doubt that the tap summary of Mr. Halperin's conversation with me is substantially correct.

59. In September, 1969, when you finally agreed to accept Mr. Halperin's resignation from the NSC staff, did you request that he continue as a consultant?

Response: I did.

60. Was Dr. Halperin used as a consultant at any time prior to his resignation from that status in May of 1970, or was he simply carried on the list of people eligible to be consulted?

Response: I believe Mr. Halperin acted as a consultant on only one occasion after his resignation.

61. When Dr. Halperin resigned from the NSC staff in September 1969, did you notify the FBI of that fact? Did you or anyone on your staff discuss whether the Halperin tap should be continued? If so, give details. Did you recommend to the FBI that the surveillance of Mr. Halperin be terminated since he would no longer have access to classified information? Did you direct the FBI to termi-

nate the surveillance of Mr. Halperin? Did you in fact on or about September 28, 1969, direct the FBI to continue the surveillance of Mr. Halperin and Henry Brandon while discontinuing other surveillances then in effect? If so, please set forth in detail your reasons for ordering the FBI to continue the Halperin surveillance. If you do not recall, please state whether you have any reason to doubt the accuracy of Mr. Sullivan's memo of September 15, 1969, which states that you did. If you did not so direct, why would Mr. Sullivan have stated that you did?

Response: I did not personally notify the FBI when Mr. Halperin resigned from the NSC staff in September 1969. I do not recall any discussions with anyone as to whether the Halperin tap was then in effect or should be continued. I did not "in fact on or about September 20, 1969 direct and FBI to continue the surveillance then in effect" I cannot explain Mr. Sullivan's memorandum of September 15, 1969, and it is not based on any authorization or instructions given by me.

62. When Mr. Halperin resigned as a consultant to the NSC staff in May 1970, did you at that time notify the FBI or anyone else of his resignation and suggest the removal of the wiretap of his telephone? Did you at that time direct the FBI to terminate the wiretap of his telephone?

Response: I did not notify the FBI or, insofar as I can recall, anyone else of the resignation of Mr. Halperin as consultant in May 1970. I may have signed an acceptance or other routine documents but I do not recall having been aware that this wiretap was still in effect at that time.

63. Did Mr. Halperin in fact have any access to classified information as a consultant to the NSC staff in the period September 1969 to May 1970?

Response: Insofar as NSC material was concerned, I assume that Mr. Halperin had access thereto in respect of matters on which he was consulted and possibly with respect to some other matters. I have no personal knowledge of the extent to which Mr. Halperin received classified information from the NSC during this period. His Top Secret clearance continued.

64. Please relate any conversations you had with Col. Haig or any other person regarding the termination of surveillance of Mr. Halperin, or of any other individual, or of the program as a whole. State when these conversations occurred and what was discussed.

Response: I do not recall any conversations with General Haig or any other person regarding the termination of surveillance on Mr. Halperin. I have stated in response to previous questions that when the program was commenced I urged that it be continued for the shortest time possible.

65. Were you aware of the fact that Daniel Ellsberg had been overheard on the telephone of Morton Halperin?

Response: Yes.

66. If so, when did you become aware of this fact?

Response: To the best of my recollection, when it became public knowledge.

67. When did you become aware that Daniel Ellsberg had been indicted for conspiracy regarding the release of the Pentagon Papers?

Response: I first became aware of Ellsberg's indictment when it was publicly announced.

68. Were you aware of the fact that in connection with that indictment an order had been issued requiring the government to report to the court any overhearing of Dr. Ellsberg on an electronic surveillance? If so, when did you become aware of this order and if you were aware Dr. Ellsberg had been overheard on the Halperin tap, did you take any steps to notify anyone that Dr. Ellsberg had been so overheard?

Response: Prior to May 1973, I was not aware of any legal obligation or court order requiring the Government to report to the court any overhearing of Dr. Ellsberg on electronic surveillance. In May 1973, the overhearing of Dr. Ellsberg became public knowledge; thus, I did not take steps to notify anyone of the overhearing. The only legal consideration affecting the wiretap program that was known to me prior to May 1973 was the view of the Attor-

ney General and the Director of the FBI that the wiretaps were clearly legal.

69. Did you, during or prior to June 1971, see the summary letter of September 3, 1969, reporting a conversation of Daniel Ellsberg? In June 1971, in the discussions of the release of the Pentagon Papers, did you assert that Dr. Ellsberg was known to be a drug user? If so, was this information derived in whole or in part from or corroborated by your knowledge of conversations overheard on the plaintiff's telephone?

Response: To the best of my recollection, I did not during or prior to June 1971, see the summary letter of September 3, 1969. I do not recall having asserted that Dr. Ellsberg was "known to be a drug user" in the discussions of the release of the Pentagon Papers in June, 1971. I do recall having discussed my personal recollections of Ellsberg. If I expressed a view as to whether or not Dr. Ellsberg used drugs, it would have been based on my own personal impressions from having seen and been with him in the past.

70. Were you ever aware that a physical surveillance (trial) was being conducted by the FBI of Morton Halperin or Henry Brandon? Were you informed that such a surveillance had been made of them at a lunch on August 6, 1969.

Response: I have no knowledge of whether physical surveillances was conducted by the FBI on Mr. Halperin.

Federal defendant Kissinger objects to responding to this interrogatory as it relates to Henry Brandon. Because Brandon is not a party to this litigation, inquiry as to him is not relevant. Further, any response by the Federal defendant may constitute an infringement of Brandon's right of privacy.

71 A. What records did you make in the period Jan. 21, 1969 to Feb. 12, 1971 of (i) meetings you attended (ii) persons who visited your office (iii) telephone conversations in which you participated (iv) correspondence you wrote or received?

Response: With respect to records of meetings I attended or persons who visited my office:

From January 21, 1969, through October 21, 1969, an appointments book was kept, listing daily appointments as they were scheduled. This usually listed only formal meetings, outside appointments, or appointments with outside visitors. From October 22, 1969, through February 12, 1971, a daily record of schedule was kept, which recorded the events of the day as they occurred. This record, unlike the appointments book, included some of my informal activity in the White House and reflects all those, including staff, who entered my office. These records were kept by my secretaries, who were usually not in a position to record subject matter of discussions, whom I met with in all meetings outside my own office, or my daily activities when outside of Washington.

With respect to records of telephone conversations in which I participated and correspondence I wrote or received during the period January 21, 1969 through February 12, 1971:

Business telephone conversations from my White House office during this period were usually monitored by my personal secretaries and records prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted.

Correspondence was deposited with White House Central Files or Substantive Files.

71. B. Where and in whose custody are such records now? If you do not know where they are now, where and in whose custody where they are now, where and in whose custody were they last, to your knowledge?

Response: All such records, with the exception of the record of my telephone calls, are in the White House. They are in the custody of the NSC staff. The telephone records are in the State Department, in the custody of Mr. Lawrence S. Eagleburger.

/s/ _____

HENRY A. KISSINGER

Subscribed and sworn
to before me this
day of January, 1976.

Notary Public

My Commission expires

Respectfully submitted,

RICHARD L. THORNBURGH
Assistant Attorney General

/s/ _____

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Supreme Court of the United States

No. 79-880

HENRY KISSINGER, ET AL, PETITIONERS,

v.

MORTON HALPERIN, ET AL.

ORDER ALLOWING CERTIORARI. Filed May 19, 1980.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Mr. Justice Rehnquist took no part in the consideration or decision of this petition.

MAY 19, 1980

Supreme Court, U.S.
FILED
AUG 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-880

In the Supreme Court of the United States

OCTOBER TERM, 1979

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX
Volume II

Petition for writ of certiorari filed December 7, 1979
Certiorari granted May 19, 1980

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

Civil Action No. 1187–73

Deposition of RICHARD M. NIXON, taken on behalf of Plaintiffs at The Summer White House, San Clemente, California, commencing at 10:00 a.m., Thursday, January 15, 1976.

Reported by:
SALLY YERGER, CSR, #2008
Notary Public

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[5] **RICHARD M. NIXON**

having been first duly sworn, was examined and testified as follows:

MR. SHATTUCK: I would like to observe first for the record that this deposition is being taken pursuant to Notice by the plaintiffs and a court order denying the Deponent's Motion For a Protective Order which was entered in the U.S. District Court for the District of Columbia on September 24, 1975 and is now recorded at 401 F. Supp. 272.

Mr. Nixon, we are familiar with the general statements that you have made on the subject of wire taps, so most of the questions I will have will go to the specific dates and specific documents and specific events.

THE WITNESS: Counsel, before you make a statement, could I make a preliminary statement with regard to my own representation in this case?

MR. SHATTUCK: Yes, sir.

THE WITNESS: As Counsel is aware, I requested that my private counsel, Mr. Mortenson, be allowed to participate in this deposition because he has represented me in matters which are indirectly related to some of the objects that may come up in the deposition. It is my understanding that counsel for the plaintiffs objected thereto. Of course, we have no choice but to accept the objection. I will go forward with the deposition. But, let the record show that I do so object to the fact that I have been denied the right to have private counsel present, private counsel who had represented [6] me in matters that are indirectly related.

Let the record show whenever there is consultation between myself and my counsel and of course between counsel for plaintiff. I say that because that has been the custom in previous depositions.

MR. SHATTUCK: I would like to call on my colleague, Mr. Slocombe, to make a brief response because he has been in contact with Mr. Mortenson on this subject.

MR. SLOCOMBE: As well as Mr. Hundley. The depositions in this case have been taken and the discovery in this case has been conducted in accordance with a protective order entered on April 1st, 1974, by Judge Smith, the terms of which include a requirement that Mr. Sullivan's deposition, the first deposition of a defendant that we took, be taken with no one present but the parties and their attorneys.

We have interpreted and I think that this applies to Mr. Christenbury as much as to the plaintiffs, that the order was applying to all depositions.

It is my understanding that the appearance which has been entered for you in this case in your private capacity was by Mr. Hundley. We have been dealing with Mr. Hundley in the scheduling of this deposition and we had expected that he would be present.

We have no objection to the attendance by your private attorney in this case. We do not believe it would be consistent with the protective order to have an attorney who represents you in another capacity and who thus, is not within the scope of the protective order with respect to [7] documents in this case which we will be discussing, in attendance without the permission of the court.

I so advised Mr. Mortenson. I assume he elected not to make an application to the court for modification of the protective order to which we would have objected, but we would have had an opportunity to discuss the issue. We have no objection to Mr. Hundley or anybody else who has entered an appearance for you in this case being present at this deposition.

THE WITNESS: Let me make it clear as far as the position counsel has just stated, Mr. Mortenson has informed me thereof. I told him that to go through the legal rigamarole of taking it up again with the court would only delay the deposition and I believe that it is important to have the deposition taken so this matter may be decided. Consequently, I have decided that we would not raise it from a legal standpoint at this point. But, I simply want

the record to show my position, just as the record will show the position of counsel from the ACLU. Obviously, counsel for the ACLU, with its very deserved reputation for being enormously concerned about the necessity for anyone in a case to be fully represented by counsel, is one that I had in mind when I thought perhaps counsel would agree in this instance that Mr. Mortenson, because he was familiar with the matters that I will be questioned on which had come up in a previous deposition, that counsel for the ACLU might not object.

But I understand your objection. You stated your position. I have now stated mine. I think you should [8] go ahead with the questions as we of course, have not too much time.

EXAMINATION

BY MR. SHATTUCK:

Q Mr. Nixon, I would like to direct your attention to the first area of questioning which will be the period prior to May 9, 1969. I will ask you first when did the name Morton Halperin first come to your attention?

A The name Morton Halperin first came to my attention I believe, to the best of my recollection, in April or May 1969. I cannot be held down to specific dates due to the fact, you should know, that I do not have my presidential papers and can only therefore check with counsel to see what information they can find which would serve to refresh my memory on it.

I think it was in April or May of that period. That is no reflection, incidentally, on Mr. Halperin. But, one must understand and Mr. Halperin is well aware, that Dr. Kissinger ran a very tight shop and Dr. Kissinger generally came into the President by himself.

And as a matter of fact, I don't even recall as far as a meeting in the oval office is concerned of his bringing Mr. Halperin in until a couple or three months after I had been president.

So, Mr. Halperin may well have been present. I may have met him on some occasion when I met with the members of the NSC staff generally. But as far as his name [9] coming up in connection with the matters concerned here, it was either in April or in May of 1969.

Q In connection with the leaks that you have discussed in your prior public statements on this matter, was there specific discussion of wire tapping in this period prior to May 9, 1969?

A Discussion with whom, Counsel?

Q With anyone.

MR. CHRISTENBURY: Mr. Shattuck, so the record is clear, I presume you are referring to the May 22 statement and the letter to the Senate Foreign Relations Committee, whether you want to clarify that this is what you are referring to or whether there is any other pubic statement you had reference to—

MR. SHATTUCK: Those are the two public statements to which I averred.

MR. CHRISTENBURY: You are referring to any discussions that may have occurred as to leaks?

MR. SHATTUCK: The question was with respect to wire tapping.

MR. CHRISTENBURY: Excuse me. Just a second. As you are aware, our restraints will be the same in that regard. We certainly want President Nixon to respond fully and responsively in this area as he can.

However our position traditionally has been that this is only a suit by Dr. Halperin and therefore as to the identification of facts relating to the specific individuals, the testimony will be limited in that area.

[10] But, within those constraints, certainly the President can answer those questions.

THE WITNESS: Incidentally, I would ask the record be changed to note the reference to Dr. Halperin, knowing how sensitive Dr. Kissinger was about being called Mister

or Doctor. I meant Dr. Halperin, rather than Mr. Halperin.

MR. SHATTUCK: I think Dr. Halperin will permit it to be used interchangeably.

Q Do you recall the question?

A Would you repeat it?

MR. SHATTUCK: Would you restate the last question.

THE WITNESS: No. I can recall it, I think, the general nature of the question. It was when there was any discussion of the use of wire tapping for the purpose of determining who within the administration might be leaking classified information; is that the question?

Q BY MR. SHATTUCK: That is the question.

A Right. I think in order to answer that question it is necessary to indicate why, as President and particularly at that time with the war in Viet Nam, when it was in a rather escalated position, I felt that it was vitally important to have tight security with regard to national security information. If counsel will permit, I will make a brief statement with regard to my concern about the need for security.

Q I don't want to interrupt you, Mr. Nixon. But I believe your opportunity to make such a statement will come during the course of the deposition and we could continue the flow of the questions.

[11] A I think that for that purpose that I can answer the question in this way then and cover both grounds very quickly. Then we can come back to you if you would like to pick it up.

At the time that I assumed office in 1969, there were five major areas in which I had determined there should be a new direction for American policy. One of course was to end American involvement in Viet Nam in a way that would enable America to continue to play a responsible role in world affairs.

Second was to develop a new relationship with the People's Republic of China.

Third was to develop a new relationship with the Soviet Union.

Fourth was to try at least, to make some progress with regard to cooling the potential time bomb in the Mid-Eastern area with all the ramifications involved.

Finally, it was to take the necessary steps with our allies in Europe to reestablish an Atlantic Community that worked together rather than against each other and to remove some of the misunderstandings that had developed during the previous administration.

These were of course, very high goals. Every president has high goals when he comes in and we tried to implement them and succeeded in varying degrees in all five objectives.

In order to accomplish this, in long discussions with Dr. Kissinger after I had selected him as the [12] National Security Advisor, before I was inaugurated, I decided that the National Security Council procedures, which as you all know had been set up by President Eisenhower and had been regularly followed during this period—which had been rather generally dismantled during the Kennedy administration and during the Johnson Administration—

Those procedures should be reinstituted and by reinstituting them, we thereby could have the kind of consultation and the broad range of discussions that were needed in order to make progress in these five areas.

Some related to each other and some were independent. As we had these discussions, I pointed out to Dr. Kissinger that I wanted to have views expressed from the bureaucracy, the State Department, the Defense Department, the CIA and et cetera. All of them were involved in national security affairs. Also, I wanted to have on the National Security Staff a variety of views expressed because only when the decision maker gets the broadest possible range of options before him can he make what is the best decision.

After having set this in place immediately after the inauguration, I recognized that there were some risks in-

volved. One of the reasons that I had some concern was based on a conversation I had with former President Johnson. This was after my nomination, of course and there was another one after my reelection before I was inaugurated.

President Johnson said he had noted my decision to reinstitute the regular meetings of the National Security Council and rebuild the staff. He said and I am quoting him [13] from recollection, that, "I must warn you." That the reason he had not had the formalized procedures in the National Security Council with the broad range of discussion that would be entailed was his, I would say, almost obsession about the possibility of leaks.

He said, "I have every confidence in my Secretary of Defense, Secretary of State Rusk, in the Director of the CIA and Mr. Rostow. But the difficulty is that when these people go back to their staffs and debrief, there are people on their staffs who, not because of any disloyalty but because of lack of judgment and because they had information and might not know how important it was to keep that information classified, might discuss it with an unauthorized person. The information leaking therefore would not enable Johnson to go forward with what he considered to be a very top secret operation.

He therefore suggested that I should take every precaution to see to it that not only the agencies like the State Department, the Defense Department and so forth had responsibility for policing their own shops in this regard but that I should take the responsibility and delegate it to someone on my own staff. That of course would be Dr. Kissinger, to see to it that any of those on his staff were people that could be totally trusted with information. He also indicated at that time that he had great confidence in Mr. Hoover. One statement he made to me was that without Mr. Hoover, and he was speaking only of National Security Council matters when we were having this discussion, without Mr. Hoover he said he simply [14] couldn't have run the foreign policy of this country during the last

difficult months of his presidency. What he was referring to, I do not know.

We come now to the period after I became president and we will get to the specific question very quickly.

Within two days after I was in the Office of the Presidency or I should say within a week after I was in office and the time can be determined if we desire, if it becomes relevant by checking further files, there came across my desk a memorandum from Mr. Hoover. It was a memorandum called a Summary With Regard To Top Secret Information.

The memorandum dealt with a British correspondent. I quickly scanned the memorandum. As you can imagine, there were a great number of memoranda that came across my desk, particularly in those early days. I didn't have much time for any of them except the most important ones. I called Mr. Hoover and said, "What is this all about?"

He said, "Well, this individual is named as one who we have been surveilling." And he indicated they used electronic surveillance for a number of years. It was inaugurated in the previous administration. I don't know whether it went clear back to the Kennedy administration or the Eisenhower administration, but he said, "We have been surveilling him for years because our information is that he is probably an intelligence agent for the British and also we therefore have every reason to believe that information he gets through a broad range of contacts within the government might get outside of channels and without any intent to harm the [15] United States, be leaked and therefore be harmful without his intent to do so."

When I saw this memorandum, I recall calling Dr. Kissinger into my office and I handed it to him. I knew the individual. He knew the individual. I said, "As far as this kind of memorandum is concerned, I don't want to see any of them in the future. I have not the time to look at them. That is your job. I mean, if there is anything that comes up that indicates a problem, then you let me know."

That was the first indication I had that wire tapping by the Director of the FBI, apparently with authority that had been given either by the Attorney General or by the President and it could have come from either or both, the previous President or Attorney General, wire tapping was undertaken in National Security matters.

We now come to the point where the question or the decision had to be made as to what if any action we would take in order to avoid leaks of highly classified information, to stop these leaks.

First, to ascertain who was leaking and second to take the appropriate action to plug up the leaks.

I again emphasized that this was not a loyalty program. I would more describe it as a judgment program because it has been my experience over the years that the great majority of people, whatever their political views, who work within an administration are loyal to the United States. They are loyal to their government. They may even be loyal to the administration, but they may have very different views.

[16] Also, I have found over many years that Senators and Congressmen who, as recent investigations have indicated, have almost an obsession about leaking information, some of them. They think it may make news. Sometimes, there are those on staffs who have a proclivity for talking loosely about what they know, what they have heard. And these people of course, are ones with whom confidential discussions should not take place.

The problem did not seem to me to be a very significant one in those early days. Now I am speaking now of the first couple of weeks of January.

But it became to me a very serious problem early in February. Early in February, I called on President Eisenhower and, as I did in the last days of his life, I briefed him on international matters and National Security matters and asked for his advice.

We had had a National Security Council meeting on our policy toward the Mideast. I briefed President Eisenhower on that particular meeting and asked for his advice.

The following day, there appeared in the press quite an accurate description of the matters that I had briefed him on. And the following day or within a very short time thereafter, Dr. Kissinger came to my office and told me that he had received a call from President Eisenhower. Dr. Kissinger, at my instructions, had called upon him before the inauguration to be briefed by him and consulted him. Dr. Kissinger said he had a call from President Eisenhower in which President Eisenhower expressed very deep concern about leaks from the National Security Council. [17] President Eisenhower strongly supported my move to reestablish the National Security Council mechanism.

However probably because of his military background and also because as President he realized that the same considerations applied during his term, even though we might not be at war, he had a passion for confidentiality. He had the same view in this regard to views that I had. That is to get the broadest range of discussions so that the decision maker can make the best decision. But he also had the view that in order to get that broad range of discussion, it was very important that those individuals who were voicing their position, and those individuals particularly who talked directly with the President or with one of the President's top advisers, be totally secure. And he said to Dr. Kissinger that we had to do something to tighten up our shop to see to it that this kind of leak does not occur or we were going to have to go back to the kind of procedures that Johnson and President Kennedy followed, particularly President Johnson. I don't quite know what happened in the Kennedy administration. But referring to the Johnson administration where as you know, this has all been publicly disclosed by President Johnson's memoirs, he tended more often than not except on very formal procedures to meet in informal meetings with three or four of his top advisers without others present.

Then in the months of January—from January 20 to February, March and April we had as you know, a rather busy time with regard to the problems of Viet Nam. Our

casualties were still running around 300 a week, despite the fact that negotiations had begun in Paris. Also, we were [18] beginning, on a very tentative and highly secure basis, negotiations in other areas.

The other areas that I have referred to were the Mideast, Europe, SALT, China, and China didn't come until a bit later. But nevertheless, that gives you an indication of the problems.

I note that Dr. Kissinger, who has examined his files, found that in the period of the first five months of our administration that there were at least 21 specific instances in which highly classified material from the National Security Council files or from files that dealt with National Security Council matters that might have existed in other agencies had leaked to the press. Dr. Kissinger and I both noted this. We both discussed it. We did not know what to do. We did not know how to proceed.

At that particular point, all that I did was to—when we had formal meetings in the National Security Council—was again to impress upon Secretary Rogers and Secretary Laird and Director Helms and upon Dr. Kissinger that it was their responsibility to police their own shops and to see to it any individuals who had access to information were totally reliable.

Second, that if they found someone unreliable, that they should limit their access or of course in the worst case, we trusted that that would not happen too often if not at all, they should of course be separated from their positions.

In April of 1969, late in April, I discussed [19] this matter and after the preliminary discussions with Dr. Kissinger about his concern and mine that we could not continue to have these frequent and open discussions which we had been having in the National Security Council unless we were able to stop these leaks.

I discussed with Dr. Kissinger and I decided that I should have a discussion with the Attorney General and with Mr. Hoover. We did have such a discussion. Mr. Hoover informed me that this had happened before in pre-

vious administrations. He said that there was only one way to deal with it. He said it had been done on a very classified basis because of the sensitivity that would be involved and the possible adverse press reaction and morale problems within the staffs and so forth and so on. But he said that in the case of four previous administrations that he had had authority to wire tap, to use wire tap where normal investigative surveillance—as you know, you can have surveillance and wire tapping. Wire tapping being the ultimate weapon that can be used and sometimes in a very effective way. One situation I will point out later if the question arises.

But nevertheless, it had been his practice where approval was given by the attorney general to conduct investigations of leaks and if necessary, to use wire taps to attempt to ascertain their source. I questioned him somewhat as to what the procedures should be. He said that the procedure would be for whoever was responsible within the White House for these National Security Council matters or national security matters I should say rather than National [20] Secuirty Council matters, that in national security matters whoever was responsible should when leaks occurred, if he considered them to be of a magnitude to be serious enough to affect our ability to conduct our policies, that he, Dr. Kissinger, should provide Mr. Hoover through proper channels the names of individuals who had access to the information and who might have leaked it or the names of individuals who because of their previous backgrounds which of course, we had all of these having had a Q clearance, a thorough investigation might have had any problem of being not disloyal because if they had been disloyal they wouldn't have been hired, but have shown lack of judgment before. And that he, Hoover, would conduct investigations to attempt to ascertain how the leaks had occurred. In addition, he said that the procedure would be that in his own investigations, he might find others. As you investigate one individual, you find they have people they have contact with and he would investigate others. But in each instance before instituting a wire tap investigation, that he, Mr. Hoover, insists it be

necessary for him to have under the law the approval of the attorney general or needless to say, the approval of the President if that was required. But the procedure we set up was approval by the attorney general. The attorney general then in answer to my question said that this was a legal problem. He cited two cases. I cannot remember the cases he cited. I think one was the Katz case. The other one I cannot recall. But two cases which had sustained the right of the Chief Executive through the FBI to conduct electronic surveillance for [21] national security matters. I told Mr. Hoover at the time and Mr. Mitchell, that I wanted these, the use of these procedures to be limited. I was aware that there had been widespread use based not only on what I learned when I first came into office, but the fact that one wiretap was in place, at least one at that time, installed by a previous administration. I wanted them limited. I also wanted the operation to be on a highly classified basis. I wanted them limited for reasons that are quite obvious. It was vitally important that the morale in a new administration not be destroyed or impaired in those who were working within the administration. It would, if they thought they were not trusted.

Second, I wanted them limited because it was vital, in terms of our relations with foreign governments, that when a President or his representative talks to a foreign leader, the foreign leader not feel that our procedures are so loose that conversations that they have in the greatest of confidence with us, we suspected might leak out.

So to summarize briefly, I would say that at the April meeting — it occurred in April—I told Mr. Hoover we would go forward with this program. I called Dr. Kissinger in and indicated to him that he should take the responsibility of checking his own staff, that cabinet officers should have the responsibility to do their own staffs. But that he should take the responsibility of checking his own staff because of the leaks that occurred up to that point. They could have come from outside the National Security Council staff, but they could have come from within the

staff. I felt that the White House above all, should set the example for the rest of the [22] bureaucracy. It was after that meeting I think perhaps in early May, that I was at Key Biscayne, Florida and a leak occurred, one of the 21 Dr. Kissinger described. This one he considered and I considered to be one that was highly detrimental to the United States and incidentally, a leak which was directly responsible for the deaths of thousands of Americans because it required the discontinuance of a policy that saved American lives.

I refer of course, to the leak of the fact that the United States, based on a recommendation made by the Joint Chiefs Of Staff, had begun bombing enemy occupied, North Vietnamese occupied, areas in Cambodia. Through a source—and even in this deposition because it would not be—you would not want me to reveal the source, might endanger him, but through a source I will not disclose, we learned that Prince Sihanouk, then the head of State of Cambodia, had no objection to our using our air power against those enemy occupied territories in Cambodia, those territories being used of course, to launch attacks upon American forces in Viet Nam. And this was called as you know, the Menu Program.

MR. SCHWARTZ: Did you say Menu?

THE WITNESS: Yes, Menu like you get at the Sans Souci, but it doesn't cost that much.

MR. SCHWARTZ: Yes, sir.

THE WITNESS: But in any event, when this occurred, the problem that it presented to us was that it broke off with Sihanouk—Sihanouk says, "As long as I don't officially know it, it is alright, but I don't want any foreigners in Cambodia. So if I know it, then I have [23] to object to whatever you do in Cambodia."

As a result of that leak the program had to be derailed. The net result to me was that because of this great tragedy of the leak, that we could not take the acts that I considered indispensable and that the Joint Chiefs considered indispensable to stop the buildup or at least abort the

buildup of enemy forces in the Cambodian sanctuaries which were making hit and run attacks on our forces in Viet Nam.

When this came up in Key Biscayne, Dr. Kissinger and I discussed it at length and I said under the circumstances—because this program was one that had not been discussed in an open NSC meeting, and was to be discussed and be held on a need-to-know basis—I said it was essential that he try to get to the bottom of it. I said that if this can leak, anything can leak. I said that I felt that this was one of those cases where he should directly call Mr. Hoover and provide to Mr. Hoover in his assessment, individuals who might have had access to this information by providing that information to Mr. Hoover.

(Discussion off the record.)

THE WITNESS: I do not know the contents of the telephone calls that Dr. Kissinger had with Mr. Hoover at that time except that I later learned he did furnish Mr. Hoover the names of certain individuals that he thought might be potential leakers of the information.

MR. SHATTUCK: Pardon me. Just to clarify, I had a question as to something we couldn't hear, all of us before.

Q Did you say at Dr. Kissinger's assessment or [24] Mr. Hoover's assessment as to who the individuals would be? I just couldn't hear you.

A Dr. Kissinger's assessment. The guidelines as to who should be investigated and therefore an investigation could mean simply surveillance.

Well, it could be three categories. Investigation could be a name check. It could be surveillance or it could be wire tapping. Wire tapping of course, being used only if the other two procedures were not adequate. In this instance, it was Dr. Kissinger's responsibility to furnish to Mr. Hoover the names of individuals that he, Dr. Kissinger, felt might have had access to information or that—he could use another test for who because of their personal records which of course Dr. Kissinger had available before

he hired them on his staff, might have had a tendency to be loose mouthed and have acquired the information without his knowledge and have put it out.

I should point out too, that in this discussion with Mr. Hoover, I of course having previously told Mr. Hoover that in his investigations he was to—if he ran into any leads or had any ideas as to who might be a potential leaker—he of course, should so indicate and if he considered the surveillance or the wire tapping necessary, get the proper approval by the Attorney General to proceed with the investigation. That's the general story. Then I realize you have specific questions.

Q Referring to those meetings do I understand that there was more than one meeting at which this subject of [25] wire tapping was discussed, specifically wire tapping and not the general question of investigating leaks?

A I think it is probable that wire tapping was discussed in more than one meeting. It was no secret that wire tapping technically had been used very, very heavily in previous administrations. As a matter of fact, when the subject came up before I made the decision, I checked as to what had happened and I found that the highest number of wire taps during the previous 20 years had been during the third year of the Kennedy Administration.

I do not say that in criticism because that was a very difficult year, as you recall.

Q Are you referring to wire tapping to investigate leaks?

A Wire tapping on national security matters, national security wire taps as I understood them.

Q But specifically with respect to the investigation of leaks?

A Yes, leaks. I suppose other things, as well. But my point is that I do not say it in criticism for the reason that in my view, that if one additional wire tap might have discovered and exposed Mr. Oswald, it would have been useful.

Q Who was in attendance at these meetings at which wire tapping was discussed in connection with the investigation of leaks?

A I have already indicated that. This is a matter that I discussed with Mr. Hoover. I discussed it with the Attorney General and I discussed it with Dr. Kissinger. [26] But, only in general terms with regard to the use of wire tapping. In each instance, I indicated my own view that I wanted wire tapping limited. I also, having had some experience in investigation and also having had an opportunity when I first came into office of reviewing some of the FBI name checks and investigations for Q clearances of personnel that we were considering for employment, I did not want to have an extended program. I wanted it to be limited to what was necessary and to what was in the national interest and what really involved national security. This is why for example, that if you will check the record, you will find that the number of wire taps for national security purposes during the five and a half years I was President was less than the average number of wire taps in the previous eight years.

Again, I do not say that in criticism of the practice during the previous eight years. I was not President then. President Johnson and President Kennedy must have had reasons which I assume were good reasons for doing what they did.

Q Were there any written records of these meetings to which you have referred, in which wire tapping was discussed with Mr. Mitchell?

A I made no records, no.

Q Was anybody present on your instructions to make written records or notes of these meetings?

A I don't recall.

Q Would Mr. Butterfield have been present for that purpose?

A No.

[27] Q Would Mr. Ehrlichman have been present for that purpose?

A Mr. Ehrlichman could have been present only where a matter involving the employment of personnel was involved. He was Counsel to the White House at that time. This is before he became head of the Domestic Council. All the personnel files had to go through his clearances, had to go across his desk.

But as far as the leaks are concerned, he could have been. I don't recall. As far as the wire tapping itself is concerned for the purposes of leaks, being quite specific, this was a matter that was closely held between Dr. Kissinger and of course Mr. Hoover and Attorney General Mitchell.

Q Did you ever dictate your recollections of any of these meetings?

A No. At that time I had not yet started the process of dictating recollections.

Q Are these four individuals the only ones who knew the information with respect to the possible or probable initiation of the wire tap program?

A I am referring to the fact that to the best of my recollection, those are the only three individuals I discussed it with. If these individuals discussed it with others, I cannot say. You would have to ask them that.

Q Was there discussion at these meetings of categories of individuals who might have access to the information that was leaked, general categories of individuals?

A Categories in what respect?

[28] Q Rather than the specific names of individuals, did you make any attempt to at these meetings, to ascertain the categories of persons who might have access to the information that was leaked?

A My responsibility I felt, was to check the category of individuals who worked within the White House and that would be primarily on the National Security Council staff. There is some overlapping of course but I would say that that would be what would be covered there. In addition, the only other categories would be people outside the National Security Council staff who might be present at Na-

tional Security Council meetings, but who were from the Department of Defense or Department of State or the CIA. As you know, all of them are statutory members of the National Security Council staff.

Q And did you make any attempt at these meetings or any of the other persons present, to narrow the categories beyond those that you have stated so that you were dealing with a smaller group of potential possible sources of these leaks? Or, was the discussion rather limited to the general categorical.

A The discussion was limited to the general categorical groups. But my instructions were very clear that the number of occasions on which wire tapping should be used should be limited. As I have already indicated, the idea of wire taps was one that did not appeal to me for a variety of reasons that I have previously described briefly and I did not want it, particularly in those early days of the administration, to have, if you may use such a descriptive term, a chilling effect on discussions within the administration and a chilling [29] effect that it might have with foreign leaders.

Let me be quite direct. If within a staff of any organization individuals feel that the boss is listening to their conversations or that they are being surveilled or what have you or if to the contrary, you have individuals sitting in a meeting and you look around the room and have a feeling that because there is an individual in that room who may leak it, all that the decision maker is going to get from his advisers is talk. It will mean nothing. And too often, that is the case.

Q How many persons in general would you say had access to this information? Would it have been thousands? By the "information," I am referring generally to the information that you were concerned about that was being leaked.

MR. CHRISTENBURY: Excuse me. I am not certain I understand. We have covered a number of areas where leaks occurred. Is your question generally as to each of

these areas, the number of people that may have had access?

MR. SHATTUCK: From my understanding of Mr. Nixon's testimony is that at these meetings the general problem of leaks was discussed and an attempt to determine how to deal with it was made. But it appears that only general categories of persons who might have access to the information was discussed. Therefore, my question is approximately how many persons would you say would have fallen within those areas, categories? You said the State Department, the NSC and et cetera.

Q Would it have been thousands or more than that?

[30] A I would be unable to say. If it were in the thousands, there would have been a new Secretary of State and a new Secretary of Defense the next day because it was my strict instructions—incidentally, President Eisenhower had strongly recommended this to me and independently, President Johnson before that had recommended to me to keep highly sensitive information on a need-to-know basis. Anybody who attended National Security Council meetings will recall that when any sensitive matters were discussed, that I gave strict instructions that there was to be no debriefings. That is not always. This again, was something that I had mixed emotions on because who knows? A debriefing with some lower level person may get an idea from that, that some high level person couldn't even think of because sometimes the lower level people are brighter than the higher level people by your design or otherwise, usually the design of the higher level person.

But the point is that my instructions were that where highly sensitive information was concerned, that those who had access to it be very limited. Consequently I expected that the surveillance, which in some cases led to wire tapping, would be limited and the fact that—I think the number was seventeen—the number of surveillances was less than in the Kennedy Administration, when there was no war except for our 15,000 advisers in Viet Nam, also in the Johnson Administration, is an indication of my

administration's attempts to keep wire tapping of this sort in the national security area to a minimum.

Q Mr. Nixon, with respect to the Cambodia bombing [31] leak which is the leak you have principally referred to, was it discussed at these meetings? Were there discussions that there may have been quite a large number of persons in the Department of Defense who had operational knowledge of the information concerning the Cambodian bombing and simply that of course, the Vietnamese and others outside of government might very well have known? Were there any discussions of that kind?

A Were there discussions of the Cambodia bombing? Let me first say that it was not discussed in the NSC meeting. It was discussed in the Oval Office for the first time. I made the decision for the first time on a Sunday afternoon. The only people present were Secretary Laird, Secretary Rogers, Director Helms, Dr. Kissinger and myself and possibly General Haig was there taking notes, although I don't recall.

But I remember the meeting very clearly because it was a rather critical decision. It was one where the Chairman of the Joint Chiefs was there, not the Admiral but the General who recently died, General Wheeler who was then Chairman of the Chiefs. I indicated in my statement to them the fact that this had to be closely held. That there could be no debriefing or leak. Obviously the Chairman of the Chiefs said, "Well, we have got to set it up and those who participate in it are going to know. If we can't trust them, we can't trust anybody."

I mean, we have had wars that this nation fought and it is usually to our great credit, not because we wanted to but because we were forced to, once we have been [32] involved in this century we have had pretty good security among our military people. But in any event, the military, as far as anybody in the State was concerned, no problem because Rogers would never debrief if he was told not to. He was highly sensitive with security matters.

As far as anybody in the CIA is concerned, I think there was no problem because Helms was highly sensitive about this.

As far as Dr. Kissinger was concerned, I didn't consider that there would be a problem. I didn't know who in his department might need to know. But it could have been possible that he felt that others needed to know.

The only problem is that, I do know this, that I wanted everybody—that the reason this had to be kept on a highly classified basis was the Sihanouk problem, that if it became known that we were doing it, Sihanouk would have to attack it and we would have to stop it. If it did not become known that we were doing it—the North Vietnamese weren't going to be objecting to it because they had constantly, at least in our assessment which proved incidentally to be right, the North Vietnamese were not objecting to it because they did not want to indicate they were occupying portions of Cambodia and Sihanouk had already indicated he did not object. He would have liked to have the North Vietnamese presence reduced because while he didn't like the idea of an American domination over his country which we never intended, he liked even less his much closer neighbors, a long time traditional enemy, the Vietnamese, North and South. He wanted them out of there.

[33] But he was in a very precarious position because as you are well aware, particularly Dr. Halperin is quite aware, the Cambodians had a very, very significant North Vietnamese—Khmer Rouge I think is the name or the title of the name that is used to describe them, elements within his country. His position would have been intolerable had he openly approved the U.S. bombing of what was Cambodian territory. But, this was enemy occupied. If I might use an analogy, I can think of no one who objected to the United States bombing the Nazi occupied portions of Western Europe, France and so forth. So, we weren't bombing France, we were bombing the Nazis.

In this case, we were not bombing the Cambodians, we were bombing the North Vietnamese and this I think was Prince Sihanouk's evaluation as well.

Q Were there in fact, persons with operational need-to-know knowledge in the Department of Defense of this Cambodian bombing? I believe your testimony is that there were. But, I want to clarify that.

A There could have been.

Q Did you ask Secretary Laird to do any checking on the leaks in the Department of Defense?

A Oh, yes. I didn't need to ask Secretary Laird. I don't recall specifically asking him. But Secretary Laird in the meeting that we had on that Sunday afternoon, Secretary Laird, one of the cautions that he raised was the possibility of leaks.

But on balance, he said we should go forward [34] because of the fact that the gain of saving American lives by reason of reducing the North Vietnamese or enemy capability in Cambodia to make a hit and run attack on our forces in South Viet Nam, he thought that outweighed the leak problem. But Secretary Laird and Secretary Rogers did not need to be told every day or at every meeting. This was a highly classified matter. They knew it from the beginning. Incidentally, both were totally circumspect and I believe did the very best they could within their departments to avoid it. I am not here now to say who leaked it. I don't know.

Q You stated that you had a conversation that day with Dr. Kissinger in connection with this leak. Did you have a conversation that day with Secretary Laird about the leak?

MR. CHRISTENBURY: Excuse me?

Q BY MR. SHATTUCK: This is May 9. Am I correct?

A No. I don't recall a conversation with Laird or with Rogers about the leak. It is very possible they were not at Key Biscayne. Dr. Kissinger was there.

It is possible I had a discussion with them later. I know that at some point very soon thereafter, he expressed concern about the leaks.

Q Did you direct Dr. Kissinger to select the names of the persons which he would give to Mr. Hoover on that day? Was it your understanding that Dr. Kissinger would select the names?

A I of course did not select the names myself because I did not know. I told Dr. Kissinger that he should [35] inform Mr. Hoover of any names that he considered to be prime suspects. By "prime suspects," again if we may use the ACLU term, I did not say that in a condemnatory fashion, prime suspects or prime targets by reason of the fact that they might have had access or by reason of the fact that they had previous records about being loose in their talk. That was Dr. Kissinger's responsibility. It was his responsibility not to control the program but solely to furnish the information to Mr. Hoover. Mr. Hoover then was to take it from there and then to get the appropriate authority from the Attorney General before of course installing any electronic surveillance which Mr. Hoover needed.

Q So it was for Dr. Kissinger on that day following your instructions, to select the persons who had access to information and based on other factors determined by him, would then supply those names to Director Hoover; is that correct?

A No. Dr. Kissinger discussed the matter that day with Mr. Hoover. My recollection is that they went back and forth, Mr. Hoover and Dr. Kissinger as to who might be the individual or individuals who should be surveilled. It was at a later date that I think was two days later that General Haig established the direct liaison with Mr. Sullivan of the FBI. I don't know who told me that. I think it was Sullivan. From that time on, Haig as Kissinger's deputy would furnish names of individuals.

And the responsibility thereafter was Mr. Hoover's to conduct a surveillance and furnish information to indicate those occasions when he felt that further [36] surveillance

would be required of other individuals because of contact that those who were being surveilled were having. And of course to indicate those occasions when he thought that the program was no longer serving a useful purpose. That was his responsibility.

Q Did you on that day May 9th, or any prior date, instruct Dr. Kissinger to request a wire tap on the telephone of Morton Halperin?

A To instruct him to tap Morton Halperin?

Q Yes.

A I have no recollection of Morton Halperin's name coming up. I do not want to sound as if I am being derogatory of Dr. Halperin, who is very distinguished in his academic background. Dr. Kissinger, one of his great talents was to surround himself with very bright people.

I do not recall Dr. Kissinger mentioning Mr. Halperin or Dr. Halperin being with him.

I have since learned, but did not know at the time, that Dr. Halperin was actually in Key Biscayne with Dr. Kissinger at the time.

Q So that the record is clear, did you on that date or any other date prior to that instruct Director Hoover or Attorney General Mitchell to install a wire tap on Dr. Halperin?

A Did I? No. I have no recollection of so doing. I think the record should show that, because the contrary was in the public press and this deposition will also be in the public press, probably in the P.M. papers—

[37] MR. SHATTUCK: Your attorney has the opportunity to say the magic words on that.

THE WITNESS: No. I have every confidence in the attorneys for the ACLU to follow a single standard with regard to the rights of those they represent, whether it is with regard to their right to counsel. You are only interested in the truth. You have a set standard.

Therefore, I leave myself totally in your hands in that respect and of course, would be very surprised if the

ACLU would, despite the great pressures you have from the press, deliberately leak any information prior to the time that Judge Smith has approved it.

MR. SHATTUCK: We will certainly treat every party and witness in this case with absolute equality, Mr. Nixon.

THE WITNESS: I am just trying to get—

MR. CHRISTENBURY: Mr. President, while I share your admiration for the ACLU, I think for clarity here we have to add a standing agreement that no matters discussed at the deposition itself would be disclosed publicly until counsel for all parties have had an opportunity to review the depositions and determine whether there are any portions that require being sealed pursuant to Judge Smith's protective order and pursuant to our understanding. I presume that is our arrangement.

THE WITNESS: Well, I must say I have every confidence of course in my fine counsel seated at my right and counsel on the left, here. But in a previous deposition, not with the Special Prosecutor, but the one involving our suit with regard to our Presidential Papers, the deposition was leaked deliberately [38] and apparently by opposition counsel to the press prior to that time.

I understand it is par for the course. If it does, I will not be surprised but I will be a little disappointed.

MR. SCHWARTZ: I am sorry. I didn't hear that. You wouldn't be surprised?

THE WITNESS: No because I figure that it wouldn't be from you.

Q BY MR. SHATTUCK: With respect to the instructions that you testified that you gave to Dr. Kissinger on May 9—

A No. No, I am sorry to interrupt you because I was talking about Dr. Halperin. There were presidential supporters and Dr. Halperin will recall this, there were some who objected to his being employed just as they objected to many that we employed in those early days and months.

There was a feeling among some of our supporters that those who had not supported us in the campaign, that we should have no holdovers, who had anything to do with the previous administration and that we therefore should be surrounded totally by what are called long-time loyalists and et cetera.

Let me say that that argument did not fall on deaf ears. I have appreciated as any man in public life must, the need to have people who are loyal and dedicated and direct. But I have also found that in order to make decisions, the decision maker must listen to and must hear a whole spectrum [39] and range of views and he isn't going to get it from a bunch of yes men. That is why I frankly approved of Dr. Kissinger's moving out as he did, not only in having a very broad range of views within his staff, many of whom had served the previous administration and some in the Kennedy Administration and some in the Johnson Administration, many of whom had been his student.

There were a variety of views. After all, they had gone to Harvard.

In addition to that, I told our people whether it was Dr. Kissinger or others, to take the flack. I said I just wanted the best man or woman for the job.

But when it came to leaks, even a loyalist can leak and has. We won't go into any specific names because leaks occurred—without getting into any esoteric conversation in this very highly structured legal proceeding—leaks occur as I indicated from the most unexpected sources. Sometimes more often than not, without a bad intention.

This particularly has become more common these days because those who do leak information and particularly those who print leak information get Pulitzer Prizes and those who leak it are made national heroes, why not leak it?

Q Mr. Nixon, so that we can clarify this last portion of your testimony, are you testifying or are you stating that you personally had no doubts about the employment of Morton Halperin?

A I was not asked about his employment.

MR. CHRISTENBURY: I don't believe the record reflects that question or response.

[40] MR. SHATTUCK: I will make that a question.

THE WITNESS: I did not. I was never asked about Mr. Halperin's employment. I was never asked about General Haig's employment or anybody on Dr. Kissinger's staff.

I did not look at—what do you call them? The curriculum vitae, I did not look at. I did not look at the FBI reports.

As a matter of fact, I have never during the time I was president, I refused to look at any one of the personnel reports on individuals that we were considering hiring because these personnel records—and this is not critical of the FBI—they cover everything from the time the person was born. It is unsubstantiated material from informants for this or that or the other thing and something that happened many years ago, which somebody has since disproved.

The net result is that first it would be a waste of the President's time. But second, it would create a very, in my opinion, uncomfortable relationship between the President and the individual he is working with to have personal information of that sort, not put in because it was personal, by the FBI but because they put in everything, not knowing what may be important.

Q So you did not express personal doubts about the employment of Dr. Halperin during this period?

MR. CHRISTENBURY: I believe the testimony was that he didn't reflect on this

I would prefer the record to speak for itself, rather than your characterization.

[41] Q BY MR. SHATTUCK: The question is framed—

A Counsel, I know you would not want to try to put words in any witnesses' mouth. I simply said that as far as Dr. Halperin was concerned, his employment by Dr. Kissinger was not brought up to me for decision. This is the

only thing that came to my attention, because it was in the public press, was the fact that there were some who thought that not only Dr. Halperin but others on the NSC staff and in the State Department were either holdovers or had other views than were currently being promulgated by the administration. But that was simply par for the course.

As far as Dr. Halperin is concerned, his name is one of many that came across. I took no note that I can recall or any notice except if unusual material came to my attention. It was passed on to Dr. Kissinger for whatever decision he felt was right under the circumstances.

Q Referring again to instructions to Dr. Kissinger on May 9, would there have been any written record of those instructions? Does there exist now written a written record of those instructions?

A I wouldn't be able to know. I don't believe so.

Q Did you dictate them into a Dictabelt at that stage?

A No. I was not as I said—I did not start that practice until years later.

Q No one would have taken any notes of those instructions?

[42] A With Kissinger and me? Not unless he did. It was just the two of us together.

Q Before the wire-tap program was initiated—pardon me. Could we take a short consultation?

(Consultation by attorneys for both sides off the record.)

MR. SHATTUCK: Pardon me. I will continue with the question.

Q Before the wire tap program was instituted, did you discuss specifically the legality of wire tapping persons to investigate leaks? I believe there has been some testimony about this. But I just want to find out precisely what was discussed, what discussions you might have had.

A I can recall no discussions. It is possible some could have occurred. I do not know. I was greatly concerned. If I could tell you why I was concerned—

Q Certainly.

A I understand that Counsel tells me that the defense here is good faith. I should make the record clear that I was told as I pointed out earlier, by Mr. Hoover that four presidents had conducted such investigations and considered them to be perfectly legal and provided they were authorized by the Attorney General and approved.

Also, that the Attorney General advised me that he had studied the law on the situation and that wire tapping, he quoted two previous cases which my counsel will furnish to you. Probably you have read those law books. You probably have, too.

[43] There were two cases which approved electronic surveillance where national security matters were concerned. I had not only that information but I had from at least an implication I felt, from my conversations with President Johnson that he felt that they were legal. He had done it. There was no question about that.

But I don't think he would have told me that he couldn't have run the office at the last unless he had had Mr. Hoover because of the material problem of leaks that he had.

So far as the good faith was concerned, I thought they were legal. But apart from that point, moving from the legality of the wire taps to what is called in legal jargon, the good faith defense, a great deal of attention has been put on the Cambodian so-called "secret" bombing which I say was aborted at a great cost of American lives because of a leak.

But I think Dr. Halperin will probably recall the EC 121 conversations. It was one of the first decisions in the administration. The EC 121—I will cover very briefly because I do not want to delay your next question—but the EC 121 involved an American plane, unarmed, being shot down off North Korea, not within the North Korean air space. It came in April, very early in the administration. We considered it not in the National Security Council but again only in an Oval Office meeting with only Secretary of

Defense, Secretary of State, Director Helms, Dr. Kissinger and myself present.

What should be our reaction? Of course, Director Helms gave his assessment that this may be a test of [44] the new administration's will. Without indicating their views, I can only say that as they should have, both Secretary Rogers and Secretary Laird indicated grave concern about any reaction, having in mind the fact that we had enough problems in Viet Nam without becoming involved in something in North Korea.

Dr. Kissinger without again attributing those views because he was only pressing them not so much as his own but ones I should consider, pointed out if we did not react that there might be further actions by the North Koreans testing a new President or by reacting, that might have a salutary effect on the North Koreans.

So the decision I finally made was to take no action except to issue a press statement. You may recall at that time I made a press statement in regard to the fact that we would take no action, but that if it happened again, that the reaction we had planned would be very devastating. As I said, I am not going to refer to the matter further except to say that a President of the United States warns only once. It did not happen again in North Korea. I have since often wondered about that decision.

But I must say that my options on that decision were considerably limited by the fact that if some of that leaked, even the fact that we were having discussions, should we or should we not, it would have been detrimental.

Again, I attribute such leaks as they occurred or dope stories to no disloyalty. They could well have been simply idle chatter that goes on between members of staffs and their friends in the press and the like. You know, when [45] he is out talking, having been on the White House staff, when he is out talking to some members of the press, he wants to prove he is a big shot and he knows everything. Sometimes it gets overblown. But that of course, would not be Dr. Halperin's problem because he

was known as an expert. Nobody would assume that he would try to blow himself up bigger than he was because he was big enough anyway in reputation.

In any event, that is the other situation. However, I should point out that as I mentioned in the Mideast situation in the NSC meeting, it leaked. That did not prove to be particularly detrimental at that point because our negotiations in the Mideast were just beginning. Naturally, we were still in power, if you recall.

Nevertheless, they were significant enough that President Eisenhower brought them very strongly to Kissinger's attention, not so much because of what was leaked but because it did leak and because he said, "Look, if they are going to leak on the Mideast, they are going to leak on everything else so be very careful who you discuss confidential things with."

Now if I could indicate to you why my concerns again grew during that period of time. As I thought of the fact that the EC 121 thing leaked, as I thought of the fact that the NSC had leaked, as I thought of the fact too that some of our official conversations with regard to strategic arms limitations had leaked—all of this is in the public record already—I had to consider some other highly confidential material which had not yet leaked.

[46–49] At this point the witness listed a number of pieces of information which he regarded as highly sensitive and still confidential. Counsel for the parties have agreed to the deletion of this discussion from the deposition as publicly filed.

[50] I am not overstating it when I say that had it not been—even with such leaks as we had—for secret negotiations, there would have been no opening to China. There would have been no new relationship with the Soviet Union, whether that perhaps would be to our interest or theirs or both. I think it is in the interest of peace in the world or will prove to be in the long run, provided we look upon detente as they do, not as an end in itself but as a means to an end. There would not have been an American

disengagement in Viet Nam and the return of our POWs on the basis that we were able to arrange through the Paris Peace Accords in 1973. And there would not have been the progress, limited though it is, that has been made in the Mideast. That is progress in which the United States in addition to having its traditional friendship with and support of Israel, is developing a new relationship with Israel's neighbors, thereby being able to exert influence for a peaceful settlement, if such a settlement can be worked out in that critical area of the world.

All of these initiatives require first a presidential leadership. But, putting the President aside, whoever was in the office, they require above all the most top secret confidential discussions and even with the best of [51] intentions, someone for example who said, "My, isn't it wonderful that we are finally going to have relations with the Peoples Republic of China," and there were many who thought that we should have done it long ago, they would have been rendering an enormous disservice to us by putting it out because then it would have made it impossible to implement.

Now, a couple of things on China that were also important. I discussed it with deGaulle at great length in 1967. Those notes I have because they are pre-Presidential. I discussed the situation with deGaulle agian in my State visit early in my term. I discussed it only in a very oblique way with the Chancellor from the West German Republic, the Federal Republic of Germany, Chancellor Kesinger, who was then Chancellor.

In August of 1969 when I was on a trip around the world, I discussed one day with Ayub Khan of Pakistan and the next day I was in Bucharest and discussed it with Ceausescu, not at great length. Primarily I was discussing with Ceausescu, Viet Nam.

A year later and this is still when we were concerned about security in 1970—and understand we are still a year away from the time we are able to make the announcement and put the thing in process—Ceausescu came to Washington on a State visit. Ayub Khan came to Washington on a

State visit. It was on that occasion and I will not indicate how it happened, but it was on that occasion that I set in motion through a private conversation known only to Dr. Kissinger, the procedure whereby a contact would be made with the Peoples [52] Republic of China which led eventually to the invitation which I implemented when the Chinese asked us to send a representative, after considering a number of people. We implemented it by sending these.

That is enough about the background. I cite these only as examples of the matters that I had knowledge of, matters also that Dr. Kissinger had knowledge of, matters that I don't know whether his staff had knowledge of or not, but they might have.

But, these matters we were desperately concerned about that they should be kept totally confidential and I come back to China. I didn't tell my Secretary of Defense. I didn't tell the head of the CIA. I told Secretary Rogers because he had to know at a certain time. I didn't tell him at the beginning. But I told him at a later time. He had to know. Of course, I had total confidence that he would recognize and he certainly did, the necessity to keep it on a confidential basis.

But in this instance, I am simply indicating that while we must have concern and this suit serves a purpose in pointing up that concern, about investigations for poltitical purposes or for personal purposes or investigations that are too loosely managed, I abhor the first and second and to my knowledge, have never used the FBI for investigating for personal purposes or political purposes.

But insofar as the FBI being used as an investigation for the national security, where the national security was involved, then I felt very strongly, particularly [53] at that time when we had a war on our hands with casualties of 300 a week, we had to deal with the Chinese and with the Russians who could have an indirect affect on the war. We had a Mideast potential blowup, we had our European allies going off in different directions. I felt it was essential

to run and for me first, to get the best advice and therefore be able to talk frequently with my associates.

But secondly, that in getting the best advice, that there must be rules of security that could be properly enforced. I must say that I am glad that it was limited to 17 and did not reach the figure of over 100 which was reached in 1963 during the Kennedy Administration. I don't say that in criticism of him. I must say that he also had problems, as you know.

MR. CHRISTENBURY: Excuse me. If I could consult with the President.

(Consultation off the record by attorneys of both sides.)

THE WITNESS: I should point out I do not want to leave the impression with regard to the Kennedy investigations and the Johnson investigations that all of them were for leaks. Some were. Others were for other purposes. They were all however, in what I call the national security classification, as I understand it or understood it. You will be better able to find that out.

Q BY MR. SHATTUCK: Mr. Nixon, at various points in the statement you have just made you have averred to leaks that actually occurred or that might have occurred and been [54] damaging if they had occurred. Do you have any reason to believe personally that Morton Halperin was responsible for any of these leaks?

A That Morton Halperin was responsible?

Q Yes.

A No. I have no reason. If he was responsible, I would assume that he would have been charged with something. Now I do understand that and correct me if I am wrong, Mr. Halperin voluntarily left the staff and that he did have apparently, some discussion with Dr. Kissinger about leaks and that he remained on as a consultant but consulted only once and probably much less than he was worth for one day. But still of course, being a consultant he was able to have contact, I suppose, with the members of the National Security Council staff. And then he resigned in May, May the 7th after the Cambodia occur-

rence. I think that is a correct assumption about his background, but that is totally from my memory.

Q Did Dr. Kissinger state to you at any point that the reason Morton Halperin left the staff had anything to do with the leaks?

A You wouldn't ask that question, Counsel, if you knew Dr. Kissinger. Dr. Kissinger is not one to come in and say that he was concerned about this fellow or that fellow. He felt that when he came in to talk to the President, he should be talking about those matters that were vital and we had plenty of them in that period.

For example, the period before Morton Halperin resigned. It was then as you recall, on April 30, 1970 and he [55] resigned May 7th, 1970 because of objections as I understand them, well intentioned—other people also objected to it because of my making a very difficult decision which I think was the right decision to destroy the Cambodian sanctuaries which were then being used again for hit and run attacks against our American forces. It was that that I would be talking about, rather than some staff matter.

As a matter of fact, people were to come in and unless it was somebody at a very high level on the staff and say that this one or somebody very high on the staff is leaking information, that would be brought to my attention.

But Kissinger didn't come and say that it was Halperin—I think we should look at some of the others for example. There were several people for example who at the time were surveilled who are still on the staff, not of the NSC but in the State Department. One went to China with him. Another I consider is the hardest line Kissinger —not only Kissinger supporter, but supporter of basically the administration—was considered to be hard on the policy as to ending American involvement in Viet Nam. Why he was tapped obviously bears on my earlier point that Dr. Kissinger I think, was bending over backwards to not finger anybody and say in all honesty that this person or that person or this person has discussed a matter and

might have had access to the material and might therefore have leaked it.

But without so charging and he never did and I never did. And he told me that before any of these people.

Q I believe you testified that you understood [56] that Dr. Kissinger had had conversations with Dr. Halperin about leaks prior to Dr. Halperin's resignation; is that correct?

A Yes.

Q And what was the basis of your understanding of the conversation with Dr. Kissinger?

A No. I talked to Counsel, my Counsel. Counsel said there was something in the record about that. I think that was the basis of that. When I say I talked to Counsel, I think Dr. Kissinger gave some sworn interrogatories. But, possibly you have not gotten around to them yet.

Q But it was not your understanding that Dr. Kissinger—this is a question—Dr. Kissinger had had conversations with Dr. Halperin about being the subject of leaks or being the source of the leaks prior to Dr. Halperin's resignation? You didn't understand that there had been a conversation between Dr. Halperin and Dr. Kissinger about Dr. Halperin's being the source of the leaks?

A No. I wanted the understanding that I—frankly, I had no conversation with Dr. Kissinger that I can recall about it. What I am referring to is that I was trying to refresh my recollection from it. I understand that Dr. Kissinger indicated he did talk to Dr. Halperin before Dr. Halperin resigned. I guess I must have assumed he must have talked to him about the leaks. Possibly, I may have assumed incorrectly. But let the record show whatever Dr. Kissinger said.

Q That was based on your reading of [57] Dr. Kissinger's Answers To Interrogatories?

A No, it was based on what my counsel told me.

(Brief recess.)

THE WITNESS: I will read for the benefit of the Reporter from Dr. Kissinger's Interrogatories. He said,

> "I most certainly discussed the Cambodian bombing leak with President Nixon and undoubtedly discussed it with my associates who were then with me at Key Biscayne, including Messrs. Halperin and A. Before I telephoned Mr. Hoover on May 9, I had discussed the leak with the President who requested steps be taken urgently to find the source of the leak. We were principally concerned the leak would provide excuse for North Viet Nam to extend its operations in Cambodia. As nearly as I can recall, I think I reported to Mr. Halperin that Mr. Hoover had suggested to me that one of them might be the source of the leak."

Q But you had no contemporaneous knowledge?

A No.

Q Was that based on contemporaneous knowledge, Mr. Nixon?

A Well, you will have to ask Mr. Kissinger.

Q But it is not stated as your contemporaneous record?

MR. CHRISTENBURY: If the record would reflect that [58] the President was quoting from the Response of Dr. Kissinger to Interrogatory No. 36 propounded to him by the Plaintiffs in this action.

MR. SHATTUCK: Mr. Nixon, if we could move on a little more quickly through some of the questions that I am going to pose now, not that I am not inviting you to give as extensive a response as you may wish, but it may be that you have covered a great deal of the material that you wish to put in the record.

Q Did you discuss the procedures to be followed by the FBI in conducting these wire taps with either Director Hoover or Attorney General Mitchell?

A Yes. I have already described that.

Q Did you discuss what records should be kept by the FBI?

A No. I assumed the FBI, having done it for years, had a system and that they would follow whatever procedures were proper.

Q You did not give any instructions not to follow the procedures that they had previously followed?

A No. I did give instructions, which I assume Mr. Hoover had received from previous presidents as well, that information should be closely held. The reasons for that were those that I had previously given you, that it would affect morale within the Department and also run the risk of leaks to the press and also our relations with foreign governments.

Q Did you give any instructions with respect to the prospective length of time that those wire taps would [59] be on?

A No. I left that to Mr. Hoover's discretion, he being an expert in this field. I felt that he would know whether the taps were producing information that was useful and would remove them or expand them to include others providing the Attorney General gave his approval where necessary.

Q Were you aware of an internal rule in the Justice Department and the FBI concerning a 90-day reauthorization of national security wire taps?

A I was not then. I am now. If I had been aware of it, I would have expected him to follow it. I assumed that Mr. Hoover was following and Mr. Mitchell as well, the rules to be laid down because we did discuss, as I pointed out in considerable detail, both the legal and the procedural aspects of this matter with Mr. Hoover and with Mr. Mitchell in April. I assumed that they would follow my directions. But, I left it to—I considered that in Mr. Hoover's case, him being very experienced and in Mr. Mitchell's case, a very good lawyer, that they would be careful to follow whatever the law required.

Q Did you discuss the criteria for terminating a particular wire tap? What criteria would be applied by who-

ever would be in authority to determine the type? We can move to that next.

A The authority for putting on a tap, I should point out could only be approved by the Attorney General. Let me be very clear that Dr. Kissinger, who furnished names to [60] General Haig, I assume could not have done so. And Mr. Hoover could suggest names as result of his investigations. But as far as the placing of the tap concerned all of them, it had to be approved by the Attorney General. It is my understanding that all were approved by the Attorney General. Now as far as the control thereafter, there was no control by Dr. Kissinger as to when the tap should be removed or for that matter put on. I of course, would have been greatly influenced as later I was, by a recommendation Mr. Hoover made or one of his associates as to making taps or putting them on.

But we did not discuss with Mr. Hoover the taps to say put them on for so many days and then take them off. But I again however say that Mr. Hoover had guidelines which I think were even more important than a day-by-day authority or time-limit authority.

I said that I didn't like the idea of tapping because of the various detrimental effects in the event of public disclosure and et cetera. What I wanted was taps only where necessary. By implication, that would mean where they were no longer necessary, I would expect him to recommend they be removed.

Q What were the guidelines to which you just referred? Were those written guidelines?

A I have covered that. Would you like to have the Reporter read it back to you?

Q Are they written guidelines?

A No. That is a different question. I didn't mean to be facetious. The guidelines I will cover again. The [61] guidelines—

Q You can just state whether they were in written form, if you wish.

A They were not in written form. We had a discussion with Mr. Hoover and Mr. Mitchell. I said that as far as—let me point out, as far as investigation and we are using the word "tap," here and it goes further than that.

As far as Mr. Hoover's investigation, Hoover's investigation could mean one of three things or all. One would be a name and field check of the individual. Two could be physical surveillance of the individual and three could be a tap of the individual.

In Mr. Hoover's case, I said to conduct investigations of whatever individuals whose names come to your attention.

I have already indicated to you how names got to his attention. That is the basis and the basis of the investigation. I said conduct an investigation, "And you will be conducting investigations in those cases where an individual has done something in his background which indicates a tendency to leak."

Second, to an individual who had access to the material.

Three, an individual who Mr. Hoover found in his own investigations might be a possible leaker. Those were the three guidelines that were to be applied.

Q Now with respect to termination of these taps and criteria to be applied and when to terminate, did you [62] provide or did you instruct anyone else to provide Mr. Hoover with guidelines as to how to terminate and what criteria to apply?

A No. I gave no written instructions. But my attitude was well known. It was often stated because I was often questioned in press conferences about how many taps we had and the numbers and that sort of thing compared with previous administrations, as you will recall.

My guidelines, orally expressed, were then well known within the administration and well known by Mr. Hoover. They were that a tap should be installed when necessary with justification and when not necessary, should be removed. But I did not write it out on a piece of paper. I didn't have to write it out for him.

MR. CHRISTENBURY: Mr. Shattuck, excuse me.

(Brief off-the-record consultation between Counsel for both sides.)

THE WITNESS: I should incidentally qualify, after consultation with Counsel, in the guidelines when I said if a guideline indicated a tendency to leak, I should expand that by saying a tendency to leak would be information in the file indicating that an individual was perhaps either sloppy or possibly, in some cases, intentionally failed to disclose his travels abroad, conversations he had and et cetera. That kind of information. That all bears on a tendency to leak.

Q How was Mr. Hoover to determine or the FBI, what information was pertinent or necessary to intercept and [63] continue on a wire tap?

A I think anyone who knows Mr. Hoover and the FBI knows that the answer to that question is that he never made that determination. The Hoover reports through the years always have the saving clause at the end that this is only a report of information and we draw no judgments. He would never make any recommendations. That goes clear back to the time that I worked with him many, many years ago on a case when most of you were not born. You weren't even born then.

Q But you have testified that taps were to remain on as long as they were necessary. How was it to be determined when they were no longer necessary?

A That could come either from a recommendation from me or Dr. Kissinger, after consulting with me, that if we weren't getting information that was worth the time, or from Mr. Hoover. I should point out Mr. Hoover, in his early years was not as sensitive about tapping and surveillance and so forth, particularly during the years of the Cold War and et cetera. The FBI was applauded for some of its covert activities. When the CIA was applauded, as you know for saving Italy in 1947 and now it is being condemned for trying to save it, as a result of the unconscionable and utterly irresponsible actions of the Committee of Congress with regard to possible United States support of NonCommunist parties in the Italian elections.

But Mr. Hoover, while I was President, was coming under increasing attack from the press and despite the fact that he is considered to be and was always considered to [64] be a martinet with regard to his staff, which he was, he was very sensitive to public relations. As the press began to criticize him and the taps and a study was being made in Princeton, one of the smaller of the Ivy League Colleges and a very good one, too, after Woodrow Wilson made it that way, even though he never attended—Mr. Hoover being sensitive about that, did not want to do tapping first any more than was absolutely necessary and second, if there was any significant danger of the information being leaked to the press, he would be subject to it. So, we didn't have an unwilling administrator of our program. I again emphasized that if he reached conclusions and he did on occasions, that he felt that some tap should be removed, I of course would take note of his judgment and give it great weight. I think as a matter of fact, it was in July of 1970 that Mr. DeLoach pointed out some of the taps should come out. My recollection may be incorrect.

Q We will get to that.

Did you at this time give any instructions to the FBI or Mr. Hoover about conversations not to be recorded, not to be intercepted on these wire taps? For example, the attorney/client conversations or husband/wife conversations or conversations about political matters unrelated to leaks? Did you give any such instructions to Mr. Hoover?

A No. I realize the ACLU is apparently not concerned about that kind of conversation in my own case, but apparently you are in this case; is that correct?

[65] Q I am not sure that we aren't concerned about it in any case in which it comes up, Mr. Nixon.

A Are you concerned? You are concerned about the revelation of private conversations between husband/wife and others. You don't believe that it should be publicized or should be public? What is your position?

Q My question stands.

A No. This is very important to me to understand the question because of your long tradition of a single standard.

Q I am talking about wire taps at the moment and the law provides that wherever possible, the interceptions that occur shall be minimized. My question is whether or not in your conversations there were any instructions that were given with respect to minimization?

A No. The only instructions were the instructions I gave generally to Mr. Hoover. Our interest was in leaks. We had no interest in political matters. We had no interest in personal matters. I was quite aware of the fact that where wire taps are concerned, that conversations as in the case of my taped conversations where the ACLU takes the opposite position which you presently now are advocating, conversations inevitably intermingle, a personal conversation with a conversation that may deal with substantive matters of very great importance. As far as the work load in the White House was concerned, I would have certainly instructed Mr. Hoover to include first only the tapping to begin with and that only the report should deal with that specific thing [66] bearing specifically on a leak.

The difficulty is the field officer with the earphones on is listening to something apparently and through the years, has not felt that he could or should make that judgment. The FBI was bending over backwards, never knowing what might appear to be a very casual phone conversation about setting up a date for a girl friend or a boyfriend or what have you, might lead to some other source of contact.

As a matter of fact, the amount of material included should be as limited as possible. But, it is apparently very difficult to do that.

Q The FBI witnesses in this case have testified that they were not informed as to the nature—I believe the record will reflect this—of the interceptions that were to be conducted. Therefore, I presume your statement that no instructions with respect to minimization were given is consistent with their testimony.

MR. CHRISTENBURY: Excuse me, Mr. Shattuck. I don't want to create an administrative problem for you. I am a little hesitant in referring to portions of the record without the witness having had an opportunity to see those. If they are specific references in a deposition, I would like you to refer the witness to it.

THE WITNESS: Let me answer the question by saying that whatever the FBI agents have testified to, they certainly are testifying to the best of their recollections, as I am. I am simply saying that I gave the instructions to Mr. Hoover with Mr. Mitchell present and he was to follow the same [67] procedures he had previously.

But also, I indicated my own concern about keeping as closely held as possible, keeping it from proliferating as much as possible. I found that he totally agreed with that. It was perhaps for other reasons, but I assume from that, that they would be handled properly.

Q Did you, during your discussions in this early period of wire taps, form a belief about the general utility of wire tapping as a way of investigating leaks?

MR. CHRISTENBURY: Excuse me. I would have to interpose an objection at this point. I think the general utility of wire tapping—I am not sure I perceive the relevancy as it relates to our case.

Now as to Dr. Halperin's surveillance, I think that is a legitimate question within the limit. I appreciate your point, but I would have to interpose an objection.

MR. SHATTUCK: I would be happy to limit the question to Dr. Halperin's case. I would note for the record that this is one of the principal areas of questioning set forth by Judge Smith, the grounds for the initiation of wire taps, as opposed to some other form of investigative method.

Q Did you form a judgment as to the utility of the wire taps to be applied in Dr. Halperin's case, following the suggestion of your Counsel that we limit it to Dr. Halperin's case.

A As to whether it was useful or not?

Q Yes.

A I have never discussed to my recollection, what [68] the taps on Dr. Halperin indicated. I think the word that the lawyers use was the "thrust," thereof. I don't know whether it was—

Q My question is really limited to the period prior to the initiation of the tap. Perhaps you don't wish to elaborate on the answer.

MR. CHRISTENBURY: My point in this regard is as to the proper foundation. Probably I got out of sequence there. The question I think, appropriately asked is whether the President recalls ever reviewing any of the product of Dr. Halperin's surveillance and that would in itself, I suspect, answer the question as to his determination as to the usefulness or lack thereof.

THE WITNESS: I have already answered that indirectly by saying I don't recall Dr. Kissinger ever discussing these taps with him. Let me emphasize to Counsel that from the time that I think was the second day after I was in office, that I received my first communication from Mr. Hoover containing what was obviously the thrust of a tap on a British correspondent.

I didn't even read through the four or five pages. I called Dr. Kissinger. I said, "Here, you know this fellow."

I said I didn't want to see these things.

Q BY MR. SHATTUCK: Turning to the period after the initiation of this wire tap, when did you first become aware that a wire tap had in fact, been installed on Dr. Halperin's telephone?

[69] A Shortly after we were in Key Biscayne.

Q Do you recall receiving reports about the thrust of the Halperin wire tap?

A No.

Q About other wire taps?

A No. I recall as you may remember we were in a rather difficult period then. We moved into the Cambodian sanctuaries May 1st, 1970. For three months my concern

was primarily on that area. So in that three-month period, I paid very little attention to anything of this sort.

I cannot recall any discussions. It would only have been I think, with Dr. Kissinger at that point. My conversations with Dr. Kissinger or with Mr. Haldeman at a later point when he had exactly the same responsibility as Dr. Kissinger and carried it out in the same way. But I don't recall anything about what it was they found out about Dr. Halperin.

Q You did state that you became aware of the fact that there was a tap on Dr. Halperin's telephone shortly after its initiation on May 9, 1969? How did you become aware? How was it brought to your attention, if you recall?

A I think Dr. Kissinger told me.

Q Did you initially receive all reports from Dr. Kissinger about the wire taps in place?

A I can recall none.

Q Certainly not about this case?

A My only concern was whether they had found out who was leaking. If he had found out who was leaking, he would [70] have told me immediately and he would have been fired. In this case, he never came in and said that.

As far as anything else that might have been on a tap, I never recall any discussions by Dr. Kissinger as to what else was on it, assuming that he was on it.

Q The records provided to us in discovery in this case indicate that beginning on May 28, 1969, summary letters from the FBI addressed to you, were sent to the White House. They were summarizing the conversations overheard on Dr. Halperin's tap. Do you recall receiving any of those summary letters?

A No. I don't recall reading any of them. It is possible they might have been received.

Again, I should point out the procedure that I had set up. You see, with Mr. Ehrlichman who had charge of personnel and received the summary letters and the applications from people for positions and with Dr. Kissinger

when I had discussed the British correspondent material which came in before our tap program began, it was that I did not want to see this material and to have somebody else evaluate it. If there was anything I needed to see, to let me see it.

As far as the summary letters were concerned, they of course would not come directly to my office. It is my recollection that they were delivered to Counsel's office and Mr. Ehrlichman, who was Counsel at that time and also the man in charge of analyzing personnel—and I don't recall Mr. Ehrlichman bringing any to my attention or any information to my attention about any of those taps in that period of time.

[71] MR. CHRISTENBURY: Excuse me. I don't want you to lose your train of thought. I believe the witness said that Mr. Ehrlichman received similar letters with regard to applicants and I guess the term "summary letters" has become a term of art in this case. I believe Mr. Ehrlichman was seeing basically reports on applicants.

THE WITNESS: Well it is basically the same thing. It is sort of a raw report. This is a report in a raw file or whatever you want to call them. But whatever it is, it is the same kind of material in some instances.

But I should point out that I am sorry. It is just as well Counsel has allowed me to make the record clear. It would not be fair to characterize or accurate to characterize the summary letters he received there with the files that he received with regard to applicants because the files on applicants should be the result of field investigations and would not involve taps unless taps happened incidentally to have come into it another way.

Whereas, summary letters did involve both field investigation and surveillance and taps. I think that point should be made.

Q But did Mr. Ehrlichman receive the summary letters we are discussing which are the reasons for this case, that were addressed to you?

A It is my understanding that he did. You will have to ask him if he did. But, they naturally were not brought in and handed to me.

Q And I believe you mentioned the personnel [72] officer for the NSC as well. Would that have been Mr. Russell Ash, that you recall?

A I have no recollection.

MR. CHRISTENBURY: Would you excuse me? If I could just consult with the witness.

(Consultation off the record between the witness and his attorneys.)

Q BY MR. SHATTUCK: Who else on your staff in the White House knew of the existence of these wire taps at this point in time?

A Mr. Haldeman.

Q I mean beginning in May of 1969.

A And Mr. Ehrlichman.

Q Any other persons on the White House staff?

A Not unless they told them. I mean, they may have informed some other subordinates. But, not that I knew about. And, General Haig, of course.

Q Did anyone outside of the White House except for the FBI, to your knowledge, know of the existence of these wire taps at that time?

MR. CHRISTENBURY: Do you intend to include Mr. Mitchell?

MR. SHATTUCK: Pardon me. I mean to exclude Mr. Mitchell as well.

THE WITNESS: I cannot say for sure that anybody did.

Q BY MR. SHATTUCK: Did Mr. Haldeman or Mr. Ehrlichman know of the existence of these taps from the beginning? In other words, from May of 1969, to the best of [73] your recollection?

A The best of my recollection is that they knew it soon thereafter. I mean, they knew more than I did what hour and what day and what have you.

Incidentally, with regard to names, I am not sure they knew about that. I am just simply saying that a program was going on of a highly classified nature where Mr. Hoover was attempting to trace down the leaks. Of course, I was asking them to do their best to help him out. I mean, in their own shops.

Q Do you recall meeting in the White House after the initiation of the tap to discuss the wire tap program or any specific wire tap in any way?

MR. CHRISTENBURY: Excuse me. I don't want—I want the President to be as responsive as he can. I appreciate the thrust of your question. But I think we will have to narrow the scope of his answer to this particular case on Dr. Halperin.

THE WITNESS: I recall no meeting about Dr. Halperin in the White House. His name could have come up in a meeting, but I don't recall it. I don't mean to downgrade his importance, you understand.

Q BY MR. SHATTUCK: Mr. Ehrlichman has testified in this case that he attended such meetings and took notes which he also testified are among the Presidential papers.

A Such meetings about Dr. Halperin?

Q About the wire tap program.

A Just a moment, Counsel. You are straying from what you said. You said you were going to limit yourself, too. [74] We are talking about Dr. Halperin. Ask me about Dr. Halperin. Did Mr. Ehrlichman say that he sat in on a meeting at which Dr. Halperin was discussed?

Q What I wish to do is to read you Mr. Ehrlichman's testimony and ask you whether you agree with it.

A Does it relate to Dr. Halperin?

Q I will read you the testimony and you can answer the question. If you believe it does not, then you can so testify.

This page 9 of the deposition of John Ehrlichman taken in this case.

A Can you furnish me a copy?

Q Certainly.

MR. SLOCOMBE: I think for these depositions it is not necessary to make them an exhibit. They are already in the record.

MR. SHATTUCK: But certainly, for your convenience, Mr. Nixon—okay Mr. Slocombe now?

MR. SLOCOMBE: "Q Did you discuss the contents of these documents with the President at any time up until May of 1970?

A Yes.

Q Would you describe those conversations?

A Not specifically. I do recall some conversations generally between the President and someone else which I attended relating to this ongoing surveillance of [75] suspects.

Q Did you take notes of such conversations?

A Undoubtedly.

Q Those notes, would you know where they are?

A In Mr. Nixon's possession."

Q BY MR. SHATTUCK: Do you agree with that testimony?

MR. CHRISTENBURY: I don't think we have the same—are you reading from page 9?

MR. SHATTUCK: The top of page, lines 3 through 13.

MR. CHRISTENBURY: I see.

THE WITNESS: Yes. I see there were discussions. When I had time, I would discuss generally the problem of leaks with Ehrlichman and Haldeman and Kissinger, sometimes together and sometimes separately.

Q BY MR. SHATTUCK: What was the nature of those discussions?

A How do we stop the leaks? What more can we do? What are we finding out?

Q Did any of those discussions relate to Dr. Halperin's wire tapping?

A I do not recall any relating to his wire taps.

Q Did you discuss the significance or the lack of significance of the information learned to date about the wire taps and particularly with respect to Dr. Halperin's wire [76] tap?

MR. CHRISTENBURY: For the record, I will have to interpose an objection to the first part of the question. I would certainly permit the witness to answer as to the latter part relating to Dr. Halperin.

MR. SHATTUCK: If I may, before the witness answers I would like to refer to Judge Smith's Opinion which does say that the plaintiffs are entitled to discovery of the grounds for the initiation and continuation of the wire tap and to the extent that those grounds are similar with respect to other wire taps we would press the question. If you would wish to instruct the witness not to answer with respect to the general nature of those discussions, it is your right to do. But, we would certainly press the question.

MR. CHRISTENBURY: I understand your position. I think we have tried to strike a good balance, here. It is as good a balance as we can by permitting the witness to be as responsive as he can in those areas, particularly relevant. But I do feel that questions going to the surveillances generally unrelated to Dr. Halperin are simply not relevant. I would have to instruct the witness in that regard.

Q BY MR. SHATTUCK: on June 4th, 1969, General Haig prepared—

MR. SLOCOMBE: This will be Exhibit A.

MR. SHATTUCK: Yes, Plaintiff's Exhibit A.

(Whereupon the document referred to was marked Plaintiff's Exhibit A for identification by the Notary Public and [77] is attached hereto.)

MR. SHATTUCK: This is a memorandum entitled "Talking Points For Meeting With J. Edgar Hoover." It is a memorandum for Mr. Kissinger. We would like to show you this memorandum I would like to read into the record paragraphs 1 and 5. Paragraph 1 reads:

"Express your appreciation to Mr. Hoover and Mr. Sullivan for their outstanding support in recent weeks in uncovering security problems within the NSC staff. Inform Mr. Hoover that you have discussed these problems in detail with the President (and with Messrs. Haldeman and Ehrlichman.)"

Paragraph 5 reads:

"Ask Mr. Hoover if he has any additional information or guidance which he feels would be helpful in this very difficult situation. Specifically, you might inquire about the requirement for prolonging the taps, making it clear that the President wishes to terminate them as soon as possible. (I think in the case of Halperin and (deleted) that they should be kept on for at least another two weeks so that a pattern of innocence can be firmly established."

THE WITNESS: I would like to reply to Counsel's question first, because Counsel asked me nine different times with regard to my instructions with regard to termination.

If I could, Counsel, please direct your [78] attention to paragraph 5 of the memorandum which is, "Ask Mr. Hoover if he has any additional information or guidance which he feels would be helpful in this very difficult situation. Specifically, you might inquire about the requirement for prolonging the taps, making it clear that the President wishes to terminate them as soon as possible."

If you want to ask that again, your question is well taken.

Q BY MR. SHATTUCK: Do you agree with that statement? Does it reflect the substance of your conversation?

A It speaks for itself. Next question?

Q Thank you, Mr. President.

A Were you aware of this when you asked me those previous questions? Were you aware of this memorandum?

Q Of course I was.

A Why did you ask the questions?

MR. CHRISTENBURY: Excuse me. I would like to know if we could take a short break.

THE WITNESS: It is all right. We are getting quarrelsome for no reason at all.

Q BY MR. SHATTUCK: Did you do anything to implement these discussions that reflect that you were concerned about prolonging the taps and you wished to have them removed at the earliest possible date?

A Exactly this kind of memorandum that I referred to, Counsel. I understand why you have to press me on the other matters because what you are trying to find is whether or not there was something specifically in writing as [79] to what conversations took place and so forth. All I can say is that I was confident that I had made it cyrstal clear to all members of the staff that the program was to be initiated first on the narrowest possible basis and with the greatest possible confidentiality and terminated as soon as possible. I think that answers the question. I don't mind being asked it again eight more times.

Q We thank you for the answer. I appreciate the answer again.

A Again?

Q Nor will I ask the question again.

A No. You can ask that. I have no control over the deposition, as you know.

Q Were you aware of any specific information obtained from the Halperin tap that established who was responsible for the leaks that were in question at the time the tap was initiated?

A Not that I can recall. I again refer Counsel to earlier references in my testimony where it says that I asked Mr. Hoover for his views. This is Haig's memorandum as to how he should proceed with Halperin who has been involved in incidents and indiscretions and who obviously has a reputation for liberal views, but who has yet to be firmly linked with a security risk.

I think that tends to bear out what I said earlier that I had heard of Mr. Halperin, clearly apart from the wire tap program and before again from people like Senator Goldwater and others who objected to his liberal views.

[80] What the word, "indiscretions," is referring to, only Mr. Halperin would be able to testify. I am sorry. I don't mean to imply that there were any, but I know of no—I can recall no discussion, Counsel, with regard to what the word, "indiscretions," means.

Unless it referred as I said earlier, to conduct by Mr. Halperin not involving a security leak, but maybe sloppy work with regard to very general and broad conversations and reporting this and so on and so on. That I would not know. But that must be in the record. But, I do point it out here that as far as the tap was concerned, it does not specifically—this memorandum indicates that as of the time of June 4th, ten days after the tap had been installed, they had nothing linking Dr. Halperin to a security leak. I am sounding like his attorney, now.

MR. CHRISTENBURY: Off the record.

(Discussion off the record.)

Q BY MR. SHATTUCK: I believe you can answer this question probably with reference to your prior testimony. But the question has not been asked. Did you ever discuss information indicating that Dr. Halperin was responsible for the Cambodia bombing leak?

A I have no recollection of that, no. I—to be candid with you, I would have been advised that Dr. Kissinger would have discussed the Cambodian bombing with Dr. Halperin because Dr. Kissinger was supposed to have kept that closely held and I didn't understand that Dr. Halperin was in what the military would call the chain of command within the NSC staff. [81] Understand that I am—but that does not refer however to other leaks which Dr. Kissinger said there were 21. As far as the Cambodian bombing leak, I would have been surprised that he would have discussed it with Dr. Halperin.

Q So you had no reason to believe that Dr. Halperin would have had access to the Cambodian bombing information?

A I have no reason. I should also point out that those on whom the surveillance was established after the Cambodian bombing leak would not necessarily have been ones who were privy thereto or thought to be privy to that information because what the Cambodian bombing leaks did and what the investigation was undertaken or was directed toward solving was not just that leak. After all the previous leaks, it finally triggered the administration to act. It was much too late, perhaps. Perhaps a course of preventative action and we wouldn't have had the previous leaks.

If for example at the time that President Eisenhower on February the 4th warned Kissinger that he would either have to cut down the size of his staff or fire somebody if they were leaking—and apparently President Eisenhower's conversation with Dr. Kissinger was quite eloquent over the phone from what I have heard secondhand, he could be right down to earth in these talks sometimes and so can I—but in any event, had we followed that recommendation, the Cambodian bombing leak might not have occurred.

I am simply surmising. But my point is that connecting the names that went into the Cambodian bombing leak [82] with the taps would not be fair or might not be accurate because we were concerned about all leaks.

(Whereupon a luncheon recess was taken, the deposition to be resumed at approximately 2:00 o'clock p.m.)

(Whereupon at approximately the hour of 2:00 p.m. the deposition of RICHARD M. NIXON was resumed at the same place, the same persons being present.)

EXAMINATION (Resumed)

BY MR. SHATTUCK:

Q Mr. Nixon, I would like to return just briefly for one question or series of questions to the role of the Attorney

General, Mr. Mitchell, in the authorizations of wire tapping that were requested by Dr. Kissinger.

Mr. Mitchell has testified and I will read to you that portion of his testimony and will provide you with a copy, that he was instructed by you to authorize any taps requested by Dr. Kissinger.

So that there may be no confusion about that, I will read you his testimony and then simply ask you whether you agree with it. It appears on page 49 of his deposition. This is line 7:

> "Q That is, your instructions from the President as you understood them were [83] that Dr. Kissinger would provide names or a member of his staff would provide names for the FBI, and that when he received such a name you are under instructions from the President to put on such a tap?
>
> A That is correct."

Do you agree with Mr. Mitchell's testimony in that regard?

A I think I would agree, but with a qualification. My instructions to Mr. Mitchell and Mr. Hoover who was present when I talked to Mr. Mitchell as I have already indicated back in April, were that our goal was to find the leakers and stop them, if we could. Second, that investigations should be conducted, and I said that there could be three levels of investigations, the third level being a tap. And whatever was necessary or considered necessary by Mr. Hoover should be undertaken.

I did not intend—in my conversation with Mr. Mitchell, he might have interpreted it that way—but when Mr. Hoover called—I mean when Dr. Kissinger might call Mr. Hoover or General Haig which would be more likely in the chain of command—it would go to Mr. Sullivan and give him some names to say please tap so and so and so and so because in some instances I don't know what the procedures were that were followed. In some instances the FBI might have determined and they have a right to determine that a tap was not necessary, that surveillance would be

enough. But it was not a specific direction that Kissinger had the authority to order [84] taps on people.

I had the authority, of course. The Attorney General had the authority. He approved them all. As far as Kissinger was concerned, it was Kissinger's responsibility to furnish the information to those who had the responsibility for implementing the policy, to furnish information as to individuals who potentially might be leakers or lead to leakers. That is the way I would interpret what I told Mr. Mitchell.

Q Was there anything further that Mr. Mitchell should do if he received a name from Dr. Kissinger or Colonel Haig to determine whether or not such a wire tap should be authorized by the Attorney General?

MR. CHRISTENBURY: I think you said Mr. Mitchell. Did you mean Mr. Hoover?

MR. SHATTUCK: No, I meant Mr. Mitchell. It was Mr. Mitchell.

MR. CHRISTENBURY: Just so I can understand, you are asking if Dr. Kissinger submitted names directly to Mr. Mitchell, rather than submitting them to the FBI and the FBI submitting them?

MR. SHATTUCK: I am not talking about anything more than Mr. Mitchell's testimony.

THE WITNESS: I understand—

MR. CHRISTENBURY: I thought the testimony reflects that Dr. Kissinger would provide names or members of his staff would provide names for the FBI and that when he received such names under instructions from the President—

THE WITNESS: I believe that what Mr. Christenbury has [85] indicated was the procedure. The procedure was that Dr. Kissinger or his deputy, General Haig—then Colonel Haig—would submit the name, or names rather, to Mr. Hoover directly, eventually it was delegated by Mr. Hoover to Mr. Sullivan who was in charge at that time.

Then the Hoover office would from there take the responsibility. But before they could institute a tap, they had to have Mr. Mitchell's approval. Now whether there could have been incidents in which Colonel Haig talked directly to Mitchell or where Kissinger talked directly to Mitchell, I do not know. It could have been. I do not know. But, it would not have been the usual procedure.

Q BY MR. SHATTUCK: With respect to the role of Dr. Kissinger in determination of these wire taps, I would like to show you a document which will be marked as Plaintiff's Exhibit B. It is a document dated September 15, 1969. It is a memorandum from W. C. Sullivan to Mr. C. D. DeLoach. It is an FBI memorandum.

(Whereupon the above described Xerox copy of a one-page memorandum dated September 15, 1969 was marked as Plaintiff's Exhibit B by the Notary Public and is attached hereto.)

Q BY MR. SHATTUCK: The second paragraph of this memorandum reads:

> "At the request of Dr. Kissinger's office, we have surveillances in effect at this time on blank and Mr. Morton Halperin, blank and blank. Colonel Alexander Haig of [86] Dr. Kissinger's office has indicated that Dr. Kissinger desires all surveillances discontinued except those on Morton Halperin and blank."

Before asking you a question about that, I would like to read you Mr. Mitchell's testimony about his understanding of Dr. Kissinger's role in determination of these wire taps and ask you whether you agree with it.

At page 58 and continuing to page 59 of this testimony in the deposition, Mr. Mitchell was also shown this document and was asked the following question:

> "The second paragraph says, does it not, 'According to Alexander Haig, Dr. Kissinger has now advised that he desires all such surveillances installed at his request discontinued except the ones with reference to Mr. Halperin and (name deleted). Accordingly, the surveillances on apparently two names are being discontinued.'

"Does the description in that paragraph of the control of the continuance of these wire taps correspond to your understanding at the time that this was up to Dr. Kissinger to decide when the wire taps came off?

"A I think I would have to answer the question the way you put it, yes. Dr. Kissinger having initiated the taps, that would be his determination as to when [87] they came off, yes."

A I think that would appear to be a difference of opinion as to who would determine as to when taps would be put on or surveillances described in the paragraph and as to when they would come off and it can be explained in this way, as I pointed out earlier, it was Dr. Kissinger's responsibility to furnish to the FBI the names of individuals who, under the guidelines that I have previously outlined, might be possible prospects for leaking information. Needless to say, when Dr.—If at any time Dr. Kissinger, after having evaluated the taps or other surveillance material over a period of time or because of the problems of leaks having receded in importance, Dr. Kissinger had then reached a conclusion that they were no longer necessary, it would be his obligation to furnish that information to Mr. Hoover and Mr. Hoover would then take them off.

I should point out however, that this is consistent with the way that I understood it and directed that the program be set up, that Dr. Kissinger should furnish the names and Mr. Hoover would institute the surveillances and furnish the fruits or results of the surveillances to Dr. Kissinger's office and that they would be evaluated and Mr. Hoover, in addition of course would recommend additional names, if he felt it was necessary or advisable because of his own investigations.

I think that Mr. Hoover under these circumstances therefore, would give very great weight to Dr. Kissinger's recommendation that a tap be removed, just as [88] he would give very great weight to a recommendation that a surveillance be instituted.

It does not indicate in my opinion that Mr. Hoover was simply acting as Dr. Kissinger's agent because in the final

analysis, the surveillances had to be approved by the Attorney General and it would be therefore a combined judgment with the final decision being made by the Attorney General. It was Hoover who removed the taps. I mean, he would discontinue the surveillances and issue the order that they be discontinued, rather than Dr. Kissinger.

Q Was it your instruction that Mr. Hoover should also give very great weight to any recommendation by Dr. Kissinger that a tap be continued when the FBI might not regard it as being productive?

A Well to be specific, I do not recall an instance in which Mr. Hoover indicated that a tap was not productive and that it should come off and in which Dr. Kissinger insisted that a tap be retained. If you have one, I will be glad to answer a question on it.

Q We do not know precisely the circumstances under which the September 15 memorandum was written, of course, for purposes of our questions in that regard.

But it is certainly possible that the wire tap on Dr. Halperin was continued specifically at Dr. Kissinger's request and it may well have been notwithstanding a determination by others that it was not productive.

I would ask the question therefore that if you have any information with respect to the productivity or [89] nonproductivity of Dr. Halperin's tap at that time, we would certainly appreciate it if you would supply it.

A I will give you any information that I know of. Dr. Kissinger did not discuss with me, that I can recall, any recommendation that the Halperin tap and X's tap be continued. I would say though, based on my long association with him and knowing that he, just as I, did not frankly like the idea of taps on his own staff for a number of reasons that Dr. Kissinger must have had, reasons he did not discuss with me. I would say also that if Mr. Hoover had believed that Halperin's tap had been—to use your term—"nonproductive," Mr. Hoover would certainly very likely I think have raised the matter with the Attorney

General who would I think, question Dr. Kissinger's deputies or I think would even take it up in this case with Dr. Kissinger or even with the President. That did not happen as far as I was concerned with it. Whether it happened on another level, I don't know.

Q The September 15 memo which is Plaintiff's Exhibit B, in the fourth paragraph reads as follows:

> "At the request of the Attorney General, who instructed that reports in this connection be sent to him and to the Honorable John D. Ehrlichman, Counsel to the President, we have a telephone as well as physical surveillance on blank. By memorandum dated 9/8/69, we advised the Attorney General that these surveillances were producing no information of pertinence and asked if [90] they should be discontinued."

Does the standard of producing no information of pertinence reflect the standard for discontinuing surveillances as applied by Dr. Kissinger?

MR. CHRISTENBURY: Excuse me.

(Consultation between Attorneys for the President.)

THE WITNESS: Could I ask whether this memorandum refers to the case in question?

Q BY MR. SHATTUCK: Excuse me. The memorandum of 9/8/69?

A The one you just quoted me.

Q I don't believe it has been produced in discovery to us. The one that is referred to in the September 15th memorandum—

A That is the one that says except those on Dr. Halperin. So far as the memorandum is concerned, I should point out that this is a memorandum from Mr. Sullivan which I do not have before me. What Dr. Kissinger's recollection is on this—sometimes, as you know, people's recollections vary, depending upon their viewpoints and their information.

I would have no comment that I think would be helpful in trying to resolve whatever difference seems to exist here between what I understand this memorandum re-

flects from Sullivan and what Kissinger's recollection is. I assume Dr. Kissinger has been questioned about this in his Interrogatories and my understanding is that he does not recall this particular conversation.

[91] Q What would be the meaning of "no information of pertinence," in connection with the discontinuation of the tap?

A The word "pertinent," to me and I think to all of those in the program would be whether or not there was information involving the purpose of the investigation, leaking. If there was no information, if there was just information about other things, that is one thing. But if there is information about leaking, then of course.

If there was no information on leaking, then it would not be pertinent. That is the way I read the Sullivan memorandum.

MR. SHATTUCK: I would like to turn now to another subject. I would like to mark as Plaintiff's Exhibit C, D and E, three documents. The first is a letter of December 29, 1969 to the President from J. Edgar Hoover. The second, Exhibit D is a memorandum, handwritten on stationery of the Summer White House, San Clemente, California to H. from John Ehrlichman and the third is a one-page handwritten note headed The White House, Washington and it is from Bob Haldeman.

(Whereupon the above described documents were marked as Plaintiff's Exhibits C, D and E respectively for identification by the Notary Public and are attached hereto.)

Q BY MR. SHATTUCK: Reading from the second paragraph of Exhibit No. C which is the letter of December 29, 1969, it says:

> "Halperin was recently in contact [92] with an unidentified individual who told Halperin that he received a call from Clark Clifford. Clifford is probably identical with the former Secretary of Defense. According to this individual, he and Clifford discussed an article which Clifford may be preparing. He said that Clifford is concerned about 'sharpening up his at-

tack upon Nixon' and that apparently he had obtained 'old Nixon statements,' one being to the effect that President Thieu is one of the five greatest men of our time. Another statement is that Viet Nam is one of the finest hours in United States history. He said that Clifford felt that whether the article would be published would depend on what alternative he, Clifford, has to offer and that Clifford asked him what alternative he could offer. This unidentified individual did not indicate what he told Clifford."

I will ask you first whether you recall reading this letter prior to any knowledge that you may have of it in connection with this case.

A No.

MR. CHRISTENBURY: You mean other than in preparation for this deposition?

THE WITNESS: No. I do not recall.

[93] Q BY MR. SHATTUCK: What was the significance in terms of the ongoing investigation of leaks of Clark Clifford's writing a magazine article attacking the administration's Viet Nam policies?

MR. CHRISTENBURY: Excuse me. I guess I have a problem. When the President indicated he never saw the document and never reflected on it at that point in time, I don't perceive the role that he had at that time. That is, in evaluating the letter and what action may or may not have been taken by others.

(Consultation off the record between Counsel for both parties.)

THE WITNESS: Counsel, I know that it is rather difficult for you to try to sanitize every question and get it down to what is absolutely specific. But I mean, you are trying to get at the heart of the matter shall we say not over the strenuous objections of my Counsel, but with his permission, I evaluated but not having seen it at the time—

Q BY MR. SHATTUCK: I appreciate that.

A As far as Mr. Clifford was concerned, I would not have seen any memorandum of this sort. Mr. Clifford had been and was very strongly attacking our policy in Viet Nam. You may recall on November 3rd, 1969, I laid out the policy and rejected the demand for immediate withdrawal and took the line which eventually led to the Paris Peace Accords and the release of the POWs on January 23rd, 1973.

Now as far as what was done as a result of this memorandum, I recall nothing at all was done and I recall no [94] discussions with me about it. As far as this, I think maybe it gets to the heart of the matter, I think perhaps that is the reason for your question, which taken generally, is appropriate. It is why would such information which would appear to be political come in?

Well, I suppose one reason would be that Mr. Clifford was not just a private citizen at the time but was a former Secretary of Defense. I can well recall when I had my briefing by the National Security Council, after my nomination, he was the strongest talker in the group. His changing his position and coming out against our position and coming out against the position that President Johnson, his former Chief, was still supporting, would have from a foreign policy standpoint, some fairly significant consequences.

Nevertheless, I would not consider myself that that would be a proper subject for the FBI to be informing the White House on because there were people against the war and there were people for the war and unless it involved illegal activity on the part—writing an article of course, is something that was not in their realm of responsibility.

On the other hand, I think the memorandum would cause some concern in the sense that Mr. Halperin at that time, while he was not a full time member of the NSC staff was still a consultant to the NSC. He still had his contacts with the NSC. He still had within that time his recollections of what policies had been and some of the top secret information that was previously disclosed.

And the fact that Mr. Halperin would be in [95] direct contact with an individual working with a former Secretary of Defense against the policy of the administration for which Mr. Halperin was a consultant, would I think, raise some doubts. I think that is the reason perhaps that Mr. Hoover sent the document in.

Q The documents which are exhibits D and E which were received by the Plaintiffs in discovery and appended to the letter from—I think that that has been established in prior depositions. Is that right, Mr. Christenbury?

MR. CHRISTENBURY: Mr. Shattuck, I am hesitant. I think we have had the problem in discerning exactly in what form or what order the documents are in. We will have to deal with them without physically specifying the order because I frankly don't know.

THE WITNESS: Just ask me the general question.

Q BY MR. SHATTUCK: It would appear that the letter is addressed to you and that the information contained therein was disseminated through several offices in the White House, particularly that of Mr. Ehrlichman and Mr. Haldeman and Mr. Magruder, although that is not reflected in one of the documents I have given you.

The question that I had was, was it consistent with your instructions for these individuals to have this information?

A Certainly not. I had always as I have indicated earlier in this deposition, indicated and instructed that the purpose of our investigation here was to stop leaks of confidential information and highly sensitive information and [96] in addition, I was not interested in and did not consider a proper purpose of such investigation to be information for political purposes as apparently the FBI and some previous administrations had been used for personal purposes.

In that connection, I should say that in my view, one of the things that has always concerned me about the FBI and the personnel files for example which were submitted when we would have to appraise people for hiring, were ones that I didn't want to see because if somebody was

going to be on a staff, I didn't want to know what his problems were or had been in early life or present life and et cetera, et cetera.

I only wanted to know whether presently he was competent, whether he could do the job. As far as his present life was concerned, unless it involved something that might impinge upon his service, I felt that it was best not to know because it would create an unpleasant relationship between me and whoever I had to work with. With regard to the wire tapping information, Counsel has quite appropriately pointed out that in some instances wire tapping summaries contained materials which are not directly related to leaks, but which contained materials which are personal in nature.

I did not like to see and did not want that kind of material. That is one of the reasons on the British correspondent's file which, when I saw that, I said, "No more of these." Again, I didn't want to spend my time on that sort of thing. Second, I did not want it unless that kind of information bore on something that involved what I had to do as President and Commander In Chief to carry out my [97] responsibilities. I didn't think it belonged there.

Third, I have as you very properly have, a very great concern about people in public life having their private lives exposed in raw data, unevaluated data and particularly exposed to colleagues and others with whom they might have to work.

When you asked the earlier question, did you give instructions that such material would not be included and the answer was I did not, a further answer would be that probably if I had, it wouldn't have meant anything because the custom of the FBI has been for many years and at least four previous administrations and I do not know what the situation is now, but in our administration it was simply to furnish all information because of the lack of knowledge of the field agent or even the individual who signed the summary letter as to whether it might not have some bit of information that they might consider to be personal and private but which somebody more cognizant of

the facts in the matter and the concerns that we had in terms of leaks, might consider it to be very pertinent. I have answered this in more detail simply to point out that in this whole program I have deeply resented not on your part but on the part of the Judiciary Committee and on the part of others who have criticized this program—and they should evaluate and criticize it—every program must constantly be reevaluated and improved as time goes on, just as we in the field of foreign policy, change our policy just as we changed our policy on Russia and changed the policy on the Mideast and changed our policy on Viet Nam and et cetera—so it is in a [98] case like that that there should be the same kind of what I call self examination and reappraisal and particularly reappraisal which will take a greater cognizance of the importance of separating what is private and personal and not relevant to the individual's not just loyalty but primarily his judgment and his actions in his government position in any investigation that might be conducted.

The wire tapping and generally the surveillance in our society is not a pleasant and not a preferable action that any Chief Executive likes to approve. It has proved in the past and during our administration during a very difficult war, we considered it to be justified on a limited basis at that time. But to the extent that the overlap even in previous administrations and in ours where the overlap as far as I can see, goes into the field of an individual's personal life, I think that that is one of the greatest deficits.

Q I have just one further question about this series of documents. Plaintiff's Exhibit D which is a two-page note on John Ehrlichman's stationery reads:

> "H—this is the kind of early warning we need more of. Your game planners are now in an excellent position to map anticipatory action."

My question is, is the happening of anticipatory action based on this information consistent with the original purpose of this wire tap as originally instituted?

[99] A No. The wire tap was instituted for the purpose of stopping leaks. That was the legitimate national secu-

rity purpose. As I have pointed out and I do not want to be repetitive, but I think it would be well to summarize it concisely now then and answer your question exactly. Some of you may know that despite my party affiliation, I am a great admirer of Woodrow Wilson. I once quoted with great approval Woodrow Wilson's very famous statement made immediately after World War I when he was going to Versailles. You may all remember the phrase, "Open covenants openly agree to." As a matter of fact, I was critical of President Johnson for a conference that he had had in Manila in which covenants had been made openly. I mean, had been agreed to openly. They had been announced openly but had been agreed to privately.

I would say in retrospect that Wilson was wrong, naive, and idealistic. But, he was wrong. In the case of world dealings between nations and even in our private sector, if you are going to have covenants that are openly agreed to, almost inevitably they must be secretly negotiated. That was true of all of the five great initiatives which I have referred to today. None would have succeeded without secrecy.

So, they would have been delayed and prolonged because of this. I would say that is also true in many parts of our domestic society. I recall for example without bringing in a completely tangential issue, of settling the longest steel strike in history in 1959. We had an open agreement settling the steel strike. But there were eight solid days and nights of the most secret negotiations between David [100] McDonald and Mr. Roger Blough and Mr. Arthur Goldberg.

I was there. Mr. Mitchell, not John Mitchell, but Jim Mitchell was then the Secretary of Labor. They were all secret. Only in that kind of negotiations where individuals knew that they weren't going to be quoted and where individuals knew nothing was going to be leaked, do you get individuals to frankly, come a little way and move this way or that way and say that they would state this now but would back away from it publicly if anything came out on it. Only that way do we get an agreement.

This seems to be tangential. But the same process applied with our negotiations with the Chinese in Shanghai and the communications with the Russians and SALT and all of our Mideastern negotiations. Of course the most difficult negotiations between North and South Viet Nam, too. And coming back to my critical point, it is well for this suit to reflect on the basis of wire tapping and the abuses of surveillance and the abuses in the field of the use of wire tapping for political purposes. For example, the suggestion that those on Martin Luther King were for political, rather than other purposes. I am not suggesting that I was there to make the decision. Mr. Robert Kennedy may have had a good reason for making it. But the point is that wire tapping on the other hand, has the liability of that because conversations run together. They are not separable. When an individual is talking on the phone or talking across the table with another individual on substantive matters that are highly sensitive, they may have discussed personal matters that are not sensitive, [101] but very personal and private and should never—that should be kept private. Political matters may be discussed that should not be made public.

Therefore, to protect the sanctity of private and political matters, the political matters I mean are in the best sense, a national consideration of great importance.

You have to weigh it against the problem of leaks. How do you stop them? Here a device was used and has been used over the years. It was used by us on a limited basis through my instructions. It did have some effect, although there were far too many situations as you pointed out which I call the personal and the private that meant nothing at all.

This is what I referred to as crap in that conversation with Mr. Dean much later.

Yet if as the result of an investigation or surveillance conducted to stop a leak, it is effective and allows a Chief Executive of the United States to succeed in a foreign policy initiative that not only may bring peace but may give a better chance for peace for years to come, that must

take precedence, trying at the same time to conduct the program in a way that minimizes the intrusions into the private and political use of wire tapping. That is inexcusable, the use of any of that in terms of the private habits of people, whatever they do. In my view, that is not defensible.

As to the use of it for national security purposes then I consider stopping national security leaks being highly important to national security, I think that that is what I am getting at when I talk about the leak. I again emphasize [102] that it has an effect in three different ways. If material leaks, it means that there is a chilling effect on the discussions that the Chief Executive Officer has with his colleagues. They are not going to talk freely, if they think it is going to be leaked. Otherwise, you are going to talk for the record so that they will look good in the newspapers or in "history," and secondly there is the chilling effect insofar as our dealings with our potential enemies or our friends because I can say from having talked to over 100 chiefs of State for many, many years, I talk frankly. They talk frankly only if they think they are talking in confidence. All of this seems far afield from the subject of Mr. Halperin's taps, but it actually is not. It relates to it all. I think it puts it in some kind of perspective.

Q I would like to direct your attention to May 12, 1970 and ask you whether you recall a meeting between yourself, Director Hoover and Mr. Haldeman on or about that date in which there was a discussion of these taps and in fact you discussed this tap.

I think the record will reflect an FBI report on this tap to the White House. Do you recall that meeting?

A No. It would have to be further described.

Q We have just shown you a document that is entitled "Sensitive Technical Coverage At Request of The White House." There is a handwritten date at the top and the phrase "Prepared For Director's Brief 5/12/70.

(Whereupon the above described document was marked Plaintiff's Exhibit F [103] for identification by the Notary Public and is attached hereto.)

Q BY MR. SHATTUCK: Other testimony in this case has indicated that this was a briefing memorandum prepared for Director Hoover for the meeting to which I just referred at the White House between yourself and Mr. Haldeman and Mr. Hoover as well. I would just like to ask you if that refreshes your recollection about the occurrence of such a meeting?

A May 12, 1970, was just shortly after we had moved on the enemy occupied territory in Cambodia. My recollections in that period, I must say, are very limited to what happened then. I don't recall this particular memorandum or conversation.

Q Do you recall about that time instructing Director Hoover thenceforth to send summaries of all the wire taps to Mr. Haldeman at the White House and to cease sending summaries to Dr. Kissinger?

A Let me read from this and see if I have it right. I am rather surprised at this.

> "We have learned through the sources that Halperin, who was serving as a consultant to the National Security Council, planned to resign."

On May 12 you had resigned. You resigned May 7, didn't you, Dr. Halperin?

DR. HALPERIN: Yes. I think this is a summary.

MR. SHATTUCK:

> "Halperin, who was serving [104] as a consultant to the National Security Council, planned to resign to protest the invasion of Cambodia. He subsequently did resign. During conversations with other individuals Halperin indicated that he feels the President intends to attack North Viet Nam and Laos and agreed to work with Senator Fullbright (D-Arkansans) in opposing the war. Halperin also stated he contacted Kuntsler, who may be identical with William Kuntsler, the attorney for the individuals recently convicted for violation of the Anti-riot Laws at Chicago, Illinois. Kuntsler allegedly is willing to join an 'organization' being formed by Halperin and other individuals. (The above are highlights received from

this coverage during the past few days. It has received very limited dissemination going only to the President and Dr. Kissinger.)"

THE WITNESS: What is the date of this?

MR. SHATTUCK: May 12, 1970. I don't mean to interrupt any statement you may wish to make, but I would simply like to say for the record that it is the best recollection of the Plaintiff, Dr. Halperin, and he certainly has documentary evidence to support that, that this reference to William Kuntsler is a misstatement of the name of Clifford. In fact, certainly the information was received.

THE WITNESS: A slightly different spelling.

[105] MR. SHATTUCK: Yes, a slightly different spelling.

Q My question to you of course, would be although it need not be asked if you wish to continue with your statement, whether you would have any information to provide that Dr. Halperin had in fact been in touch with Mr. Kuntsler. I am sure—I presume you do not and it is his best recollection that this is a misrepresentation of the facts. In any event, I didn't mean to interrupt your statement.

A Well, let us be quite candid. Dr. Halperin would be the first to admit that he, along with others, opposed the action in Cambodia and apparently Dr. Halperin also I am sure, probably assumed as did some others that I was now going to order an attack on North Viet Nam and Laos.

Well, he was just two years early. I did it two years later. It was one of the best decisions I ever made.

Q I believe the question pending is whether this document and your reading of this paragraph refreshes your recollection about the meeting that you had with Director Hoover.

A No. I do not know.

MR. CHRISTENBURY: Excuse me. The meeting you are referring to is the one where a decision was made to send summary letters to Mr. Haldeman, rather than Mr. Kissinger?

Q BY MR. SHATTUCK: That is correct.

A That meeting I do remember. But I don't remember it in connection with any discussion of Dr. Halperin, no.

Q Could you summarize the gist of the meeting [106] that you recall with respect to directions that you gave to Director Hoover to send summaries thenceforth to Mr. Haldeman?

A Yes. My best recollection is that prior to that time, General Haig came in to see me. He expressed great concern about Dr. Kissinger's very emotional and very concerned reactions to the Cambodian action, not that he was opposing it. I was concerned and sometimes emotional, too. It was a very difficult time. And Haig told me privately that he felt that it was important that in now conducting the Cambodian operation, that giving the guidance which we of course did, through the Wasag Committee which was the Washington Special Action Group, Dr. Halperin sat in it.

Q I am sure your attorney and myself are not familiar with that.

MR. CHRISTENBURY: We appreciate any explanation.

THE WITNESS: I don't know why they called it Wasag. But nevertheless, Dr. Kissinger called it Vesseg.

Nevertheless, he said we have simply got to get some of the load off of it and those reports that are coming in from Hoover which were being sent in which have been coming in to him and of course Haig was carrying an enormous load, too. They were working day and night. I was having some sleepless nights as well. He said he would like to have the responsibility for—up to that time, it was still being handled by Dr. Kissinger and he was assisted by his deputy, Colonel Haig. He wanted it transferred to someone else and suggested that it might be Mr. Haldeman.

I agreed that I wanted Dr. Kissinger to [107] concentrate his full attention to subject A and I determined that the best individual to assume the functions that he had as-

sumed with some limitations thereon, which I will explain, would be Mr. Haldeman.

I picked Mr. Haldeman to do this for several reasons. One was because, as I pointed out earlier, that he was totally privy to all of our major foreign policy issues. As Chief of Staff, he could sit in on national security meetings. He was one of four who knew about the China initiative in the entire government. He participated in the May 8 decision. He participated in the December 18, 1972 bombing decision. That was the B 52 bombing decision. I say that only for background to indicate why Mr. Haldeman's expertise was not limited to matters that had to do simply with where to move the furniture around the White House and the Presidential schedules.

The other reasons that I selected him were that Mr. Hoover was always expressing concern about proliferation of his reports. He was sensitive about press criticism, always sensitive of press criticism and particularly press criticism of possible wire tapping, not so much as to White House staffers that were involved, but where newsmen were involved.

He said he wanted to and would prefer to have one man work in the White House and only one rather than send two copies which he was sending previously.

Mr. Hoover had great confidence in Mr. Haldeman and ironically, so did Mr. Kissinger. Mr. Haldeman and Dr. Kissinger had each other's confidence and Mr. Haldeman had [108] my confidence. Consequently on that date or shortly thereafter, I indicated to Mr. Hoover that the reports that up to that time had been going to the NSC should be sent to him, all reports from the FBI. He should evaluate and question if he found material that should be brought to the attention of others involving national security matters or leaks, to be more specific. He should bring it to the attention of Haig and others, otherwise that there should be no further action on his part and that he should have a direct contact with Hoover or with whomever Hoover should designate he should have those contacts with.

Now I know that the charges have been made, maliciously and viciously—and not by you but by others—that and at the time were totally false, that the transfer from Kissinger to Haldeman was for political purposes so that Haldeman could gather political intelligence on people that Hoover was wire tapping. That is totally false.

I can recall no instance of any kind in which Mr. Haldeman initiated a political investigation. He would not have had the authority to do so. The Attorney General would have to have approved it. Second, I can recall no instance where Mr. Haldeman used any such information or reported any such information or used it in any other way. He acted impeccably as far as I know in handling these reports, just as Dr. Kissinger handled them. As a matter of fact, I think there was less proliferation when he handled them than when Dr. Kissinger did.

He used his assistant, Mr. Higby, as I later [109] learned, to run through them so that he wouldn't have to spend too much time going through too much material because he also was busy.

But beyond that, I know of no proliferation. But there was no political use and no private use that I know of. None was authorized. None was intended. I wanted to lay that to rest once and for all.

Q I would like to refer back to just briefly to Plaintiff's Exhibit D which is the one-page handwritten note that we discussed in connection with the letter of December 29, 1969. It is a response to the memorandum letter. It is Plaintiff's Exhibit D on John Ehrlichman's stationery. It is handwritten and addressed to H. It says:

> "This is the kind of early warning we need more of. Your game planners are now in an excellent position to map anticipatory action."

Then there is Exhibit E which is Mr. Haldeman's response to that memo which says:

> "I agree with John's point. Let's get going."

I will ask you whether that is consistent. I believe I have asked this question already. But, I will ask you

whether it is consistent with the original purpose of this wire tap and the information coming over the wire tap?

A No. The use of it, the use of the information of the wire tap for what can be described as political purposes, was never directed and never authorized. Had it been submitted [110] to me, it would not have been approved.

Let me now however distinguish that Mr. Clifford activities were not, to use British understatement, a "top secret." Virtually every gossip columnist and even some responsible columnists were writing about what Mr. Clifford was going to say and what he was doing. He was talking all over town about his intention to write articles and so forth.

Mr. Haldeman's reaction which obviously I can see from his scrawl, was an instantaneous one, was probably a natural reaction that if Clifford was going to take after us that we better get an article written to answer it.

We did not have—Mr. Haldeman or Mr. Ehrlichman—did not have to have Mr. Hoover's summary on a conversation that Mr. Halperin had allegedly with Mr. Kuntsler or Mr. Clifford. I think we knew Kuntsler. We didn't have to have that to know that we ought to have some kind of action going in terms of getting our side across in an aswer to Clifford and many others.

May I say again, I respect their views, although I totally disagree with them. We had to debate them and we did.

Q Plaintiff's Exhibit C which is the two-page letter to the President dated December 29 from Mr. Hoover begins "Previous communications have set forth information which we obtained from extremely sensitive sources concerning contacts made by Morton H. Halperin." Then it refers to Mr. Clifford. What would your understanding have been concerning the use of the term "extremely sensitive sources," as the source of that information?

[111] A Extremely sensitive sources means to me, having been exposed to some of this type of material over many, many years, including the years I was Vice-president, electronic surveillance.

There is one other possibility here, I am sorry. Mr. Hoover used that term and the FBI used that term, "extremely sensitive sources," and the CIA does as well for electronic surveillance or possibly—but, this couldn't possibly have happened with Mr. Halperin, like a secretary or somebody else in his office who was ratting on him. But, that wouldn't have happened to him. So I imagine, that what—

Q Referring again to the meeting that you had with Mr. Hoover and Mr. Haldeman concerning the redistribution of the summaries to Mr. Haldeman, would there have been a tape of this meeting if it were conducted in the Oval Office in May of 1970? Would that meeting have been taped?

A The taping system as you probably know—I have not had the opportunity that Counsel would have had to study all this, was not installed until the spring of 1971. There were no tapes until then.

Q Did you make any notes concerning that meeting or dictate any Dictabelt recollections?

A No.

Q To your knowledge, did Mr. Haldeman make any notes of that meeting?

A As far as I know, no. He might have.

Q You didn't direct him to make any notes?

A No. He would at times. At other times he would [112] not. He had an exceptionally good memory. At times he would just sit there. I assume he would dictate something later. But I don't know that he did. But I did not.

I made no notes in that period, in the 69/70 period. Just so you will know, there are no—there was no taping system until March 1 guess it was of 1971. I had no Dictabelts for that period.

I am sorry, I do have one Dictabelt in that period. I do have one in December of 1969 because I expected and I recall this distinctly because I thought it was such an historic occasion, President Johnson's returning to the White House in December, a year after he had left.

He came to one of the worship services. We had breakfast the next morning and had a long conversation. I remember again that in that period President Johnson expressed his concern about leaks of information. He expressed support for what we were trying to do. He knew how difficult it was. He didn't express political support, you understand.

On the other hand, while I am not one who will say any one of us or any individual in government has not made mistakes including Mr. J. Edgar Hoover whom I had a great respect for—he again expressed his feeling that Mr. Hoover was very reliable and he also said that on that occasion for whatever it is worth for historical purposes, he had been terribly disappointed in what had happened to some of his previous aides who had been the strongest hawks he—he was referring of course to Mr. Clifford—who turned totally around. I think that he was concerned because—not [113] because I was President but because he expressed again his admiration for Mr. Rusk, whom he said really didn't have a strong feeling about Viet Nam in terms of the time we entered it or became more deeply involved. It was entered of course before Johnson came in. But his respect for him because he said that here was a man who could have gone out and came out as a critic, but here is a man who recognizes how great responsibilities are and doesn't turn on his former President and supports the present President in a very difficult hour.

I say that in behalf of both men because it shows the measure of them. I should point out one other thing about Mr. Hoover because obviously we have said some things here which may tend to reflect on him. It seems to be rather common these days and so justified—because anybody who does anything is going to do things that are unjustified—but in the conversations that I had with him, he discussed several former presidents. I never heard him utter a word of criticism about President Truman, President Eisenhower, President Kennedy or President Johnson. I have never heard him indicate to me any leak with regard to the activity they might engage in that he thought might be political and advantageous for me to

know, particularly if they had been of the other party. I have heard him only make some rather shall we say not too complimentary remarks about Mr. Ramsey Clark.

Q Did you ever read or discuss the summary letters that were sent to Mr. Haldeman from May of 1970 until the discontinuance of the taps? I will start by asking you whether you ever read any of them.

[114] A I don't recall Mr. Haldeman bringing any to me. He might have. If he did, I might have. I have no recollection of having read any of them. If one would have been of great enough importance it would have been brought up to me. I think I would recall it. But if you can refresh my memory on this, I will be glad to—

Q Did you have conversations with Mr. Haldeman about any of the information that he was receiving from the FBI, anything that he thought of importance that he called to your attention?

A Nothing in that period that I can recall with Mr. Haldeman. If you will give me the dates again—

Q Yes. May 12, 1970 until February 10, 1971 when the taps were discontinued in Halperin's instance and other taps were discontinued.

A The only conversation that I could recall with regard to any taps and I recall none with regard to Mr. Halperin incidentally, but the only conversation I can recall involved an individual who had been a top member of the National Security Council who had accompanied Secretary Kissinger on some of his frequent trips including several to Paris on the Viet Nam negotiations and I believe even on one to China, who resigned from the staff and who later became a foreign policy adviser for Muskie.

Dr. Kissinger felt that he was concerned about the individual, not because of who he was—because he considered him to be a very honorable man with just an honest disagreement with the policy—but he was concerned not because [115] of any political advice he might be giving Mr. Muskie but because he was afraid that the secret negotiations with the Chinese and with the Vietnamese might be blown.

Taps that occurred in that period indicate absolutely honorable conduct on his part in that respect and as far as any political information, there was none. That is the only conversation I recall offhand.

Q I understand, following your testimony, that you do not recall reading any specific letters in this period. I would like to show you two letters, one dated June 23rd, 1970 to Mr. Haldeman signed by J. Edgar Hoover and the other dated November 13, 1970 to H. R. Haldeman signed by J. Edgar Hoover.

(Whereupon the above described documents were marked Plaintiff's Exhibits H and I respectively for identification by the Notary Public.)

Q BY MR. SHATTUCK: If I may, I will read you the paragraph on Dr. Halperin in the June 23 letter.

"Morton H. Halperin, who recently resigned from the National Security Council as a protest against the invasion of Cambodia, was contacted by Howard Gillette (phonetic) who is apparently connected with Project Purse Strings, a group formed to support 'Peace' candidates in forthcoming elections. Halperin, at Gillette's request, agreed to talk to the 'top people' in the offices of [116] Senators Norris Cotton and James B. Pearson on the war in Cambodia. Gillette described Senator Cotton as 'marginal' on the Church-Cooper Amendment but said that Halperin's talk could make Senator Pearson favor the amendment."

Was the reporting of this information about conversations Dr. Halperin had to the White House, consistent with the original purpose of the Halperin wire tap?

A Dr. Halperin at this time had received—his relationship as a consultant—when did he resign?

Q It was in May of 1970. So it was prior to that. You are right.

A Yes. I would not consider that as consistent, no.

Q The letter dated November—

A Let me say that I should qualify that by saying except for the fact that Mr. Halperin, even though he re-

signed from the staff of course, would still have a considerable amount of knowledge with regard to a number of highly classified activities, some of which have been made public and others of which have not been made public.

Only to the extent that discussions involved such activities, would it be consistent. This involved Mr. Halperin as a former member of the staff trying to develop support against the administration's foreign policy and that he had every right to do.

Q With respect to the letter of November—

[117] A I can imagine, having been once a member of the Senate and it was well known that he was working there on November 13, yes, sir.

Q The third paragraph of the letter of November 13 reads:

> "Halperin and Gelb also discussed a meeting which may take place this week to advise Senator Muskie concerning 'China Policy.' They discussed the fact that Nichols, Warnke, Barnett, Halperin, Tony Lake, Reed Perkins and Oxenberg may participate in the meeting. Lake is probably identical with William Anthony Lake, a former member of the National Security Council staff."

At this time I will ask you whether or not you were aware that Dr. Halperin was working for or advising Senator Muskie?

A I could have been. And of course, I would not have been surprised because many of those who had been working with our staff and when I say that, there were not many, but some who had been working with our staff and who left our staff because of disenchantment with regard to our program to end American involvement in Viet Nam, that they would have done it in a different way, did feel that Senator Muskie was the best alternative and went to work for him.

Q Would the reporting of this information have been consistent with the original purpose of the tap?

A No and it was not requested, as far as I know.

[118] Q On February 11, 1971—

A I notice Mr Lake's name is here. Mr. Lake's name, I have already indicated would have meant something, due to the fact that he had more recently been privy to very, very confidential negotiations. If they became public, it would have aborted the programs.

Q So the record is clear and correct me if I am wrong, I believe you previously testified it was known that Mr. Lake was working for Senator Muskie?

A Yes. There was a public announcement.

Q And there was no reflection on Mr. Lake as to the information with respect to the possibility for his responsibility of the leaks?

A No. That is exactly what I said. As a matter of fact, as you will note from both of those or either of those, they indicate no leak and that is without question the reason that probably Mr. Haldeman or whoever was in charge of it, Mr. Haldeman at that point through whom these various summaries were sent, would not have brought them to my attention because he knew very well that my interests were solely in the leak problem as far as the FBI activities were concerned.

Q On February 11, 1971, the records produced through discovery in this case indicate that the Halperin tap and evidently others were discontinued. Were you aware of the discontinuance of the taps at that time? Did you have any discussions about it?

A No.

Q Did you have any discussions with anyone prior [119] to this time about the discontinuance of the taps? Did you have any discussions prior to this time about discontinuing it?

A Well, no discussion in regard to discontinuing the taps that I can remember except that there were discussions of Mr. Hoover's concern about attacks that were being mounted upon him at that time for his antiwar dissident program or whatever that was and with regard to

taps generally and Mr. Hoover was really sensitive about it.

Q Do you know who made the decision to discontinue those taps?

A The decision was made by the Attorney General, I believe. It was by Attorney General Mitchell.

Q Were you aware of any practice—

A He had the authority.

MR. CHRISTENBURY: Excuse me. I want to make it clear that the witness is saying this of his own personal knowledge.

THE WITNESS: Yes. Of my own personal knowledge. I am not aware, but I assume that the decision was made by Mr. Mitchell. I cannot recall his informing me of it. But he might well have sent a memorandum. I don't know. I don't have one. I don't know if he sent me one.

(Consultation off the record between the Attorneys for both parties.)

THE WITNESS: Counsel, before we proceed I would like for purposes of being sure that the record leaves no misconception, to point out that Mr. Haldeman and Mr. Ehrlichman's actions and memoranda that they exchanged with regard to the [120] information that they received insofar as Mr. Halperin working with Mr. Clark Clifford and also with regard to other activities being engaged in by former members of the NSC staff, who were working with people and opposing the administration on the conduct of the war, I should point out as I did previously that I did not consider that to be a part of or within the guidelines of the program that I set forth. The purpose of the surveillance program was to stop the leaks and the wire tapping was to be part of that program if and when necessary and only as long as necessary.

It was not for political purposes and certainly not for that and to avoid wherever possible any invasions of privacy. However, I would under no circumstances leave the implication that Mr. Haldeman or Mr. Ehrlichman were acting in bad faith because after all, this nation was en-

gaged in a war at that time. Mr. Haldeman and Mr. Ehrlichman and others knew or at least believed that the policies that we were following would succeed in ending American involvement in a way that would allow us to continue to exercise our proper role of leadership in the world.

They were also aware of the secret negotiations that were going on between Dr. Kissinger and our colleagues in Paris and in Mr. Haldeman's case, he was aware of the upcoming initiatives that might develop, particularly with regard to China and later with the Soviet Union.

In both of their cases, I can well see why they might consider information that former members of the White House staff were actively working with others, be they [121] political or otherwise, against what they considered to be the right kind of what I would not call a war effort, but a peace effort, could be their justification in terms of good faith.

I think that should be put on the record in fairness to them. My answer to your earlier question related to my understanding and as far as I was concerned, I perhaps did not become as concerned as they did about such activities as Mr. Clifford because the war was one that divided Americans in both parties and all age groups and it was one in which men like Mr. Lake in particular, I would say left their positions not for political purposes, but because they were against the war.

Now it is going to take somebody much better than you or much wiser than I to sit in judgment as to their good faith on that particular issue as to whether their motivation was political or whether their motivation was basically the security of the nation, having in mind that those who were opposing what the administration was doing were actually working for a program which in my opinion, did in fact, prolong the war because as long as the enemy had the impression that there was a substantial chance that there were some who would take peace at virtually any price, and could be elected President, they would hang on. It was only when they became convinced that there

was no way of settling that way that they stopped. I am not making a stump speech about the war. That is all done now. But you have to put yourself in the position of those men at that time.

Q Was it your understanding at that time that the use of wire tap information for political purposes however [122] that may be defined and I will leave that to you, would be illegal?

A No. I am not going to make a judgment on that. What is your next question? You can't expect me to give—wire tapping for political purposes—do you suggest for example—you wouldn't mean to suggest that maybe President Johnson's surveillance and possibly wire tapping of candidates for president or vice-president was illegal, because he thought they were going to take a position that would jeopardize his peace efforts in 1968. Was that illegal? I ask you the question.

MR. CHRISTENBURY: I think we have—

THE WITNESS: You see my point? When you get into this, you are getting into a situation where it depends on the motive. I mean, I think the motive has a lot to do with the legality. Also, when you say what is political and what is not political, you have to have in mind that overriding the politics in this issue was the national interest in bringing to an end a very long and difficult war, where reasonable men and patriotic men and women honestly disagreed as Mr. Halperin and his colleagues disagreed.

I am setting that forth certainly so that the record shows that. At the same time, I point it out as I did earlier, that the purpose of the program that I had set up was to stop leaks. That was simply an offshoot of it which developed due to the fact that the individuals who were working with others who were mounting a massive program of protest against the war, which in my opinion did prolong the war by [123] encouraging the enemy to hang on, this effort is one which the FBI reported. If mistakenly, certainly in good faith because they considered it to be one that involved something other than politics. It involved peace, which was very unusual at that time.

Q Did you have any discussions after Dr. Halperin or other persons who had been wire tapped left the government about the legality of continuing the taps on them after they had left the government?

A I recall no such discussions, no.

Q Would your judgment have been affected as to the legality of those taps, had you known that they had left the government, which I take it you did?

A No. No. Just a moment. I did know about the tap on the individual in the National Security Council staff that I have referred to whose name we will not mention. As I understand, we are not mentioning names. As far as the legality of the tap on Dr. Halperin, I had no discussion of it.

If it had been raised, I would have considered it to be legal, yes, due to the fact that he had had access to top secret information. He had at least some record which showed indiscretions, using that term very precisely. Under the circumstances, it was important to know whether or not that indiscretion might lead to a leak which we would have to protect ourselves against.

Once the war was over, it didn't make any difference. Let me say also that as far as that was concerned in the case of Dr. Halperin and as I said, he guessed wrong on North Viet Nam [124] and Laos by two years. You can't really fault him for that. In the case of the other individual that I mentioned who left the staff, I know of no instance brought to my attention where he did leak it. But on the other hand, had the matter been brought to my attention for decision as to whether the taps should be continued, if Dr. Kissinger had asked me for example, I would have said yes because of the information they had.

Q Would the passage of time after leaving the staff be a factor in determining the continuing legality of the tap?

MR. CHRISTENBURY: Mr. Shattuck, I have a little trouble in that area. The President has testified that the decision was never presented to him to make.

To have him at this date, some six years later speculate as to what he might or might not have done, had the deci-

sion been presented six years ago, I don't think serves any useful purpose. I think it is improper. We would instruct the witness not to answer.

MR. SHATTUCK: Well Mr. Nixon has testified that it was his instruction not to unnecessarily prolong the wire tap, any wire tap including Dr. Halperin's. I think we are entitled to question as to what the unnecessary prolongation of that wire tap might have been within the meaning of that instruction. If you wish me to rephrase the question in those terms, I would be glad to.

THE WITNESS: Let me answer the question in a way I think Counsel who has very appropriately objected, will be satisfied. That is my Counsel. The taps should be removed, [125] if after a certain length of time there were no fruits from it which indicated that the individual was not conducting himself responsibly. The tap should be removed if the issues with which the individual was cognizant became nonissues. Does that answer your question.

Q Yes, thank you.

Who was responsible for implementing the instructions not to unnecessarily prolong the wire tap? Who would have made the determination that it was being unnecessarily prolonged and then would implement the instructions to discontinue it?

A I would take the advice of my National Security Council adviser, Mr. Haldeman, Mr. Mitchell or Mr. Hoover. Matters would be discussed if they were brought to my attention.

Incidentally, I think I should point out, too, that Counsel just before we recessed, very properly asked that—reminded me during the recess that as far as the discontinuance of all taps, that Mr. Mitchell must have ordered it. That is only a surmise on my part. I don't know. I do know there was discussion about the concern that Mr. Hoover was going to go up to the Hill to testify, as you know.

As we know, it was his general custom before testifying to reduce the numbers of taps and to reevaluate them all

and to reduce them to what he considered to be the necessary, productive ones and particularly at this time he was highly sensitive about the number of taps due to the press criticism he had been receiving.

Mr. Hoover and I am only surmising, which I [126] should not do in this deposition, but I will surmise because it is perhaps closer to what happened than the suggestion that Mr. Mitchell ordered it, that Mr. Hoover after due consideration and checking with members of his staff and probably checking with Mr. Haig or whomever, had reached the conclusion that as far as the taps are concerned, nothing had been produced for a certain length of time and he thought they could be safely, in the national interest, removed. There was no objection that he remove them.

My guess is that there is not a piece of paper, but there might be. Perhaps you can make that search. I have no piece of paper and I was not asked. If I had been asked, I would have approved the removal.

Q Did you at this time or subsequently form an opinion as to the usefulness of the Halperin tap and the other taps as well, although I am not questioning you about those.

A You can question about them. I can answer specifically.

Q Did you form an opinion about the usefulness of the Halperin tap?

A Well—

MR. CHRISTENBURY: Excuse me. I think that it should be pointed out that the President has testified that he never reviewed any letters with regard to Dr. Halperin and certainly he didn't make any day-to-day decisions as to their usefulness or nonutility and this was simply not his role. It is very similar to my earlier objection that we are forcing upon him now to take a position and a role that he did not exercise six [127] years ago.

THE WITNESS: I will then limit my answer, if my Counsel will permit, to just a general observation which may be helpful for the record.

It may not be helpful to Dr. Halperin in his case. I would say that the use of electronic surveillance is a tortuous, long and having talked to some who have engaged in it, boring exercise. But, also the individual conducting it is looking for what they call the big break. They seldom find one. In the case of these taps generally, there were no so-called big breaks.

On the other hand, as a result of the taps there was a tightening of procedures within the National Security Council as to access to information because of the fact that not speaking of leaks, in those precise terms, but speaking of loose talk and just general personal conduct, the procedures were tightened and individuals who had had great access before had that access reduced.

Second, in some instances it is my understanding that not in a direct way, but in an indirect way, individuals were transferred or separated from their previous assignments due again, not to precise information but to information that was considered to be important enough to require it.

I finally would say third that as far as the usefulness of the taps are concerned, they were not useful politically and were not usable politically. They were not useful in terms of so-called invasions of privacy and were not so used.

[128] The third thing is that we have to examine them in the light of the situation at the time. We, as I have pointed out earlier, do not have just those matters that are of public record but other highly sensitive matters.

Counsel, I am going to suggest to that list of highly sensitive matters which members of the NSC staff would have had access to and which even today should not be made public. Therefore, this kind of preventative action was indispensable. I cannot separate for example—I know you are concerned and I am concerned too about what are called the excesses of the CIA. Let's leave assassinations out. Let's go into covert activities. Let's leave out countries like Angola, if you want to.

But as I referred to earlier with regard to Italy, I was in Italy in 1947. I was a young congressman. I know that without American assistance, the Noncommunist Parties would never have survived at that time, at least that was my conviction and it was a conviction that was held when a Democratic president was in the White House.

I strongly supported his efforts and those of the CIA then under his direction to be of assistance.

Now today, we have a situation and it is not on all fours with this, but it is an indication of it, where the situation in Italy is difficult. One picks up the morning paper and reads that a committee of congress has performed a great service by exposing the fact that the CIA may provide funds for the Noncommunist parties in Italy and so two lines of criticism develop. One is that it should not be done at all [129] if they can't get the funds on their own, they don't have a right to survive. That of course, overlooks the fundamental fact that in a period of detente, the risk of war goes down but the risk of conquest without a war through subversion and covert means goes up geometrically. That has been true for years.

Coming back to the other way, the argument about that is that if we help Italy, the Noncommunist parties we should do it openly. So if $100,000,000 goes to the Christian Democratic Party and so forth in covert activities that the United States has had where free political parties are fighting against a Communist party, a Communist party supported quite openly by the Communist Party of the USSR, the support that we have given has been covert.

If it is given openly, ironically, it would be kiss of death to that party, because there is no American political party in the world. There is a Communist political party in the world.

Let me come back to this, now. As we examine the CIA as we are and as we examine the FBI and its activities in the field of surveillance, it is the age old problems civilizations in all modern times have been faced with. You have to balance security and freedom. In some areas you have

all freedom without security and in other areas security without freedom.

In America, we have the blessing of both. What we were trying to do with this program was to maintain security with the least possible infringement upon freedom. It is not [130] always possible to do so.

We did our best, but it is not always possible. I would say finally with regard to those who may be investigating us, of course it is not an investigation of the FBI except insofar as it relates to Dr. Halperin, but the investigation of our objectives abroad. I can think of nothing at this time and I am not thinking of the death of agents whose cover is blown as a result of a statement made by some individual conducting an investigation, but to weaken the United States covert activities or capability at this time may be good for short term politics, but long term it is disastrous to the security of this country. People will look back and remember. Well, enough of that. I am not attempting to say that as far as these leaks were concerned, that we put those in such elevated terms.

But I do know and I speak with authority on the subject, that had we not controlled the leaks even as well as we did and after the Pentagon Papers case when it became fashionable to and also rewarding for a government official to leak and newspapers to play with them on doing so, that had we not been able to conduct our policy with some confidentiality, we could not have made the progress that we have made in the five areas that I have mentioned.

That is why we tried to present our argument of good faith in this area. We are not pressing it simply as a legal way to get off. You have on these, maybe not intentionally but possibly inferred that maybe this was all illegal. But, it was not intended.

[131] But as far as I am concerned, I considered it to be legal. If I had been the Attorney General I would have ruled that it was legal. I think that is one of those areas where under proper handling, and it can be properly handled, that the use of electronic surveillance to enable the United States to conduct a responsible foreign policy, to

get all the options and to get the best possible advice and to get the communication with people abroad that we need to have, communication straight across the board without their feeling that it is going to leak out and also not to have the American position in these negotiations leak out so that it destroys it and you are unable to have a deal.

I believe that for those fundamental reasons that this kind of activity first, was not only right but then from the standpoint of security of this country I think it was legally right. I do not suggest this, that mistakes were not made as they inevitably will be, particularly in such a highly sensitive area. By "mistakes," I mean possible infringement on the rights of the privacy in the use of material for political purposes. Although, there I think a good faith defense might well be made. But I am not going to sit here and simply take the position that as far as Dr. Halperin and his colleagues were concerned we were tapping them because we wanted to know about their private lives or we were concerned because they were liberal or we were concerned because they were against the war and et cetera and et cetera.

We were concerned about our responsibility to conduct the foreign policy of this country, a foreign policy [132] which ended the draft, foreign policy which developed a whole new world, a very difficult one and not necessarily one that was a sure one in each area as in the Mideast, in Europe and in the Soviet Union.

So I have now told you again about my argument. It is not simply good faith, the Justice Department to the contrary notwithstanding.

Q Mr. Nixon, I would like to try to conclude this deposition this afternoon. I think you probably would, too. We have several more questions in a few areas. I believe that we can conclude this afternoon. Although we would never want to cut you off in any area, I will not do so. I would just like to say for the record that it is to our interest to conclude the depositions as quickly as possible.

If there is anything you wish to offer that is not within my questions, I would invite your Counsel to question you about it.

I would like to introduce a transcript prepared by the Impeachment Inquiry Staff of the House Judiciary Committee of a recording of a meeting between the President and John Dean on February 28, 1973 from 9:12 to 10:23 a.m. I would like to have it marked Exhibit J for identification. I would like to note now for the record that there is no Exhibit G in this case, if anybody is looking for it.

(Whereupon the above described was marked as Plaintiff's Exhibit J for identification by the Notary Public and is attached hereto.)

[133] Q BY MR. SHATTUCK: I would like to direct your attention to page 1751 and also page 46 which is the last page of the exhibit and ask you several questions about it.

Do you agree with the statement that you made in connection with the utility or lack of utility of the wire tap on Messrs. Halperin and Lake?

MR. CHRISTENBURY: We would of course permit the president to respond only as to Dr. Halperin. Which paragraph are you specifically referring to?

MR. SHATTUCK: It is page 1754, the second response of the President.

> "Incidentally, didn't Muskie do anything bad on there? (Unintelligible) Henry (Unintelligible). At least I know not because I know that, I know that he asked that it be done, and I assumed that it was. Lake and Halperin. They're both bad. But the taps were, too. They never helped us. Just gobs and gobs of material: Gossip and bullshitting (unintelligible)."

THE WITNESS: Do you have a question?

Q BY MR. SHATTUCK: Does this statement reflect a view on your part as to the utility of the Halperin wire tap?

A I have already indicated that the Halperin wire tap insofar as the big break was concerned, insofar as a spe-

cific leak was concerned, was not useful. That is my opinion.

Q You refer to the tightening of security as a result generally of those taps in the case of Dr. Halperin. I [134] believe that the record indicates that the tightening of and closing of his access with respect to certain information was accomplished prior to the initiation of the wire taps.

With that in mind, what tightening could have occurred with respect to Dr. Halperin and the tightening of access?

MR. CHRISTENBURY: I am not sure and correct me if I am wrong, that the testimony has been that all of the tightening occurred prior to the wire tap. I think that certain matters in the record reflect that there was a particular tightening around May 9.

My perception is that that tightening continued after the surveillances were in progress.

THE WITNESS: That is my understanding. Next question?

Q BY MR. SHATTUCK: The following statement was made by you about two-thirds of the way down the page.

> "The tapping was a very, very unproductive thing. I've always known that. At least, I've never, it's never been useful in any operation I've ever conducted. Well, is it your view that we should try to get out that '68 story then, if we can?"

With respect to the first two sentences of that quotation, does that reflect a view on your part at the time as to the productivity generally of wire tapping for detection of leaks?

A I have already testified at great length with regard to my appraisal of wire tapping, what it was and what it [135] was not. I have nothing to add.

> (Consultation off the record between Counsel for all parties.)

THE WITNESS: Incidentally, you were incorrect when you said, "Your view that we should try to get out of that '68 story." That is not accurate. It was, "Get out that '68 story."

Do you know what the '68 story was?

Q BY MR. SHATTUCK: No, I do not.

A The tapping of my plane. Whether it happened or not, I don't know.

Q What was the basis of your conclusion with respect to the Halperin tap that it consisted of gobs and gobs of material, gossip and bullshitting? Was it based on your review of the information what was produced in that wire tap?

A I have answered the question earlier. I did not review personally the material. I only got general reports from Dr. Kissinger who did review it and later on from Mr. Haldeman. That was their appraisal.

Q It was based on the reports made to you?

A That's right.

Q I would like to turn to the period of June and July of 1971. In June and July of 1971, do you recall meeting periodically with members of your staff concerning the investigations of the Pentagon Papers publication?

A Yes.

Q Do you recall Morton Halperin's name ever coming up in connection with those discussions?

MR. CHRISTENBURY: Excuse me, Mr. Shattuck. I appreciate where this line of questioning is going. I think within certain restraints it is appropriate.

If you are to inquire as to a possible use of the wire tapping material, I think that is appropriate and we would respond to the extent that the witness has any knowledge.

However, were we to stray into general inquiries and into the general areas of the Ellsberg case, I think Dr. Halperin, in his answers to interrogatories, he can't make inquiries in that regard. Consistent with my objection, if you would channel it in that area.

Q All right. Do you recall Dr. Halperin's name coming up at these meetings?

A I have no recollection of it, no.

MR. SHATTUCK: I would like to have marked as Plaintiff's Exhibit K, a one-page memorandum dated 6/15/71.

(Whereupon the above described document was marked as Plaintiff's Exhibit K for identification by the Notary Public and is attached hereto.)

THE WITNESS: Why don't you read the memorandum? Just read the memorandum aloud.

MR. SHATTUCK: As we all have copies of the memorandum, I only wish to read one or two portions of it. But, you of course are free to read as much as you wish.

It says:

"Re: Morton Halperin

[137] During the summer of 1970, Halperin, who is presently employed by the Brookings Institution, Washington, D.C., worked for the Rand Corporation in California."

It goes on to say:

"Halperin is an extremely close associate of Leslie Gelb who is also employed at the Brooks Institute. Gelb and Halperin co-authored an article which appeared in the Washington Post on 5/24/70. This article was critical of administration policy in Viet Nam. On 5/25/70, Gelb and Halperin received $750 each from Secretary of Defense Clark Clifford for an article apparently regarding Viet Nam."

THE WITNESS: They wrote it? Oh.

Q BY MR. SHATTUCK: Do you recall ever—

A They were underpaid.

Q Do you recall ever reading this or seeing this memorandum?

A No.

Q Did you at the time in June of 1971 at the White House, receive periodically information concerning persons discussed in connection with the Pentagon Papers investigation?

MR. CHRISTENBURY: Excuse me. If you will repeat the question, because I am fearful that we are starting into an [138] area of my concern. Could you read that?

MR. SHATTUCK: Read the question back.

(Record read.)

THE WITNESS: Do you want to ask me about Halperin? Why don't we get to that?

Q BY MR. SHATTUCK: Yes. Did you receive information from the FBI in connection with or concerning Morton Halperin?

A With regard to the Pentagon Papers?

Q Yes.

A I don't recall Halperin's name in regard to the Pentagon Papers, no. I think it was Ellsberg that did that.

Q Was there any discussion of the possible role of Morton Halperin in connection with the publication of the Pentagon Papers?

A I don't recall any discussion. It could have been. I don't recall.

Q Have you ever before seen the contents of that memorandum?

A I have no recollection of having seen it. I may have, but I have no recollection of it.

MR. SHATTUCK: John Ehrlichman has testified that he took notes at a meeting on June 17, 1971 attended by you, Dr. Kissinger, Mr. Haldeman and himself. The notes indicate that Kissinger described Daniel Ellsberg as being involved with "drugs."

I would like to have marked as Exhibit L, Mr. Ehrlichman's notes of 6/17/71 identified by him in a [139] deposition.

(Whereupon the above described document was marked as Plaintiff's Exhibit L for identification by the Notary Public and is attached hereto.)

Q BY MR. SHATTUCK: Do you recall Mr. Ellsberg being characterized at these meetings as involved with drugs?

A I am sorry. I didn't think this deposition was about Ellsberg. Do you want to relate it to Halperin? You must understand, I am trying to be—you wanted to—

Q For the record, I have a series of questions on this and that will be my next question, in fact.

A Why don't you lay a foundation for it? You must know how to do it.

Q Were you aware that Daniel Ellsberg was overheard on Dr. Halperin's wire tap?

A I have no recollection of that.

Q So you don't recall ever seeing any such summary letter from the FBI?

A I have no recollection of it.

Q Did you see any summary letter from the FBI at this time, not previously?

A I am referring to it. I have no recollection of seeing it at this time.

Q At this time, not previously?

A Yes.

Q I would like to repose the previous question. Was there discussion at these meetings of Daniel Ellsberg's [140] using drugs?

A I don't recall a discussion. I recall these meetings. I don't recall any specific things.

I do recall a discussion of Ellsberg by Kissinger, whether others were present or not I don't know. He discussed it several times because we were greatly concerned about the Pentagon Papers and their release and their publication because it was massively detrimental in its effect on our foreign policy.

Of course the fact was that it meant that our leak problem would become worse in the future. I remember that Kissinger volunteered that he knew Ellsberg and all that I can recall about—and I recall this incidentally before reading this memorandum because it was fresh in my mind—the case became rather well known. It was even better known that Dr. Halperin's, that he said that he was a brilliant student. He said however that he was emotionally unstable.

He recounted something and I understand that much of it was in the press, that in Viet Nam he was a hawk and used to ride around in helicopters shooting anybody that wore black pajamas on the ground that they might be the V.C.

As far as the use of drugs was concerned, I do not recall his using the term "use of drugs." He may have. I don't recall. I am just saying emotional instability.

I might have surmised from that, anything. But the use of drugs I do not specifically recall him saying.

MR. SHATTUCK: Mr. Ehrlichman's notes also indicate that on July 10, 1971, there was a meeting with him and Mr. Haldeman here at San Clemente at which you discussed the question of [141] appearances by witnesses before the Pentagon Papers grand jury. I would like to have marked as Exhibit M, Mr. Ehrlichman's notes of that meeting of July 10, 1971.

(Whereupon the above described four-page document was marked as Plaintiff's Exhibit M by the Notary Public and is attached hereto.)

Q BY MR. SHATTUCK: I would like to ask if this refreshes your recollection of such a meeting?

MR. CHRISTENBURY: Mr. Shattuck, this may be the only point at which we will substantially disagree. I will leave you to your remedies. I believe Dr. Kissinger's Answers to Interrogatories clearly demonstrate that he does not have any standing to inquire as to what may or may not have taken place at the Ellsberg—

Q BY MR. SHATTUCK: You mean Dr. Halperin?

MR. CHRISTENBURY: I am sorry. Dr. Halperin and so we object.

I don't think the questions are appropriate. He was a consultant. But, that certainly does not give him any standing to assert the constitutional rights of Dr. Ellsberg.

MR. SHATTUCK: I think that in response to Counsel's statement—

MR. SLOCOMBE: The question to which you referred had to do with what Dr. Halperin did in a trial which only started almost a year after that. In connection with this case, because of the statute, we are entitled to inquire as to any use of the wire tap fruits. It is our contention that the notes which are [142] the subject of this question may reflect a discussion of the fruits of the wire tap. Therefore, they are relevant and the questions about them are likely to produce relevant evidence.

THE WITNESS: Well now you have asked me, Counsel, the question, have I seen the notes.

Q BY MR. SHATTUCK: No. Does this refresh your recollection?

A No. You have asked me the question as to whether or not I have seen the memorandum with regard to Dr. Halperin's relations with Ellsberg and his brother and all that business and boyfriends and girl friends and the drugs. Is that was you are referring to?

Q No. I don't believe that is—

MR. CHRISTENBURY: Maybe we can strike an accord here because I certainly appreciate the relevancy of part of what you are saying. I think you are entitled to inquire as to the removal of the records and certainly any use that may or may not have been made of such records at the White House. I don't think on the other hand, general inquiries as to discussions regarding the Ellsberg trial, other than being particularly channeled to the specific wire tap material is appropriate. Maybe we can strike an accord on this area.

(Consultation off the record between Counsel for all parties.)

MR. CHRISTENBURY: Are we able to strike an accord?

MR. SHATTUCK: I would just hope that the following question would reflect a possible accord.

Q I would direct your attention to the notes that [143] we have just furnished to you and ask you the meaning of the sentence or the note:

"Grand Jury—don't worry re: taps on discovery of WTTS."

Does that refer in any way to these wire taps?

A I don't recall. I think you would have to ask Ehrlichman about that.

Q You don't recall any discussion?

A No. I recall the discussion about the whole matter of Ellsberg, the Ellsberg trial and—

Q Was there any discussion of whether suspects or possible grand jury witnesses might have been wire tapped?

A No. I don't recall any discussion of that. I do not—let me say when I say no that I spoke too quickly. I do not recall the discussion about the grand jury, "Don't worry re: taps on discovery."

I do not recall that discussion. Mr. Ehrlichman may recall what he meant. For example just before that, it says, "Rogers should be tapping more."

I have no recollection of what that could possibly mean. You will have to ask Mr. Ehrlichman.

Q Do you recall having any discussions in July of 1971 regarding the disposition of documents relating to the wire taps? This is another subject. So, we will leave this particular memorandum.

Do you recall having such discussions?

A Yes I did. That was here at San Clemente.

Q Who participated in those discussions?

[144] A Mr. Mardian.

Q And was Mr. Mardian directed to come to San Clemente by a member of your staff?

A I don't know. He came to report on the progress of the Ellsberg case. He gave a report on that. I don't recall what the progress was, what they had decided to do, whether they were going to indict and so forth.

I remember that I had come down strong against moving against members of the press. The question of whether

or not Ellsberg himself should be moved against was a very close one. Finally the Attorney General decided to move on the Ellsberg case.

Q In connection with the disposition of those documents, were there any discussions at your meeting with Mr. Mardian?

A Yes.

Q Had you directed Mr. Mardian or a member of his staff to get Mr. Mardian to come to that meeting for such a discussion?

A I don't recall directing him to come. But I do recall what happened as a result of the meeting and the discussion.

Q What was the nature of those discussions? What was discussed?

A It was at the last meeting that Mr. Mardian expressed a concern that he said was shared by Sullivan and by others apparently on my staff. I think he was referring to Ehrlichman, although he did not as I recall say so.

[145] It was that with the Pentagon Papers case out and with the Ellsberg matter come up, that the wire taps could become a very, very hot news issue. Then he expressed concern on two other matters, one was the possibility of their leaking, leaking and having them become—or we feared that leaks would then become—epidemic and running through the whole establishment. That is, of the whole bureaucracy.

The second concern was that Mr. Hoover might use the taps that he had in his possession for the purpose of having leverage on me so that I would retain him as Director of the FBI. Now I will comment on the second part and then on the first part.

The second part probably is not related. But it would be to the extent you see a student of history.

Mr. Hoover, in all the time I knew him, including my time as President, never threatened or blackmailed me. Whether he did with others, I cannot say. I would be surprised.

But nevertheless, as a matter of fact in the meetings I had with him, he always said that he was approaching the age of 75 and, when I had seen him at Easter this year, he had told me when he was under attack by Hale Boggs, the late leader of the Democrats in the House who died in a plane crash in Alaska, I told him I would stand by him.

He said, "I will resign any time you want me to, if you think it will help because I don't want to be a liability as this campaign comes along."

There were some on my staff—I had received memorandums from some and I am not indicating that they felt [146] that Hoover should resign because of his age, but there were other reasons as well that were expressed. This gets back to the Mardian view about Hoover, that he expressed. He said that he and others believed that Hoover might use the taps for blackmail purposes.

I said I didn't believe that. They said that the other point was that they might leak in any event, if they were left there at the FBI, with the Ellsberg thing coming out and the political atmosphere heating up and he felt and others concurred that they should be removed from the FBI to his office.

Mr. Sullivan by that time, had had a falling out with Mr. Hoover. Mr. Sullivan agreed with this particular procedure. So Mr. Mardian apparently picked up the package from Mr. Sullivan and took them to his office and later delivered them to the White House, where they were kept in the custody of Mr. Ehrlichman in his office and remained there until they were returned.

Q Did Mr. Mardian state to you what connection he believed there was between the possibility of these wire taps leaking and the Ellsberg prosecution?

A Absolutely not. They were two totally different subjects. His comments on the Ellsberg case were simply to bring me up to date on what was happening.

His comments on the wire tap had to do with Mr. Hoover and their concern about the use of blackmail, the possibility of a leak. There was absolutely no discussion

whatever of the taps insofar as the Ellsberg case is concerned.

[147] In fact, I was surprised a couple of years later to find that there was something in one of these tapes, apparently something in one that you referred to earlier in which there had been a Halperin/Ellsberg conversation or Halperin's brother and Ellsberg, having a conversation. I don't know what—that is as far as I heard about it then.

Q You testified that Mr. Mardian said the wire taps could become a hot issue. Did he set forth the basis for that statement? What was the basis for his statement that the wire taps could become a hot issue?

A Because at that time Mr. Hoover was under very great fire. Secondly, the Pentagon Papers had blown the idea, which up to that time was that honorable servants of the government agreed or disagreed with policy, but would not become traitors in effect and turn over highly classified top security information in breach of the law to publications and thereby endanger the national interest.

If that kind of attitude, which when it happened instead of there being an outcry of protest and condemnation from the press, brought almost universal praise not only for the paper that printed them including the Pulitzer Prize but for the individual who stole them—not stole them, but who liberated them. Under those circumstances, the possibility that some pip-squeak bureaucrat even in the FBI, would want to be a hero and say that he had some wire taps. That was the sort of thing.

As a matter of fact, after the Pentagon Papers case, we were desperately concerned about the possibility of the [148] proliferation of leaks, due to the fact that leakers then had in effect, become national heroes.

Q Did you know—

A And also gained a little money.

Q Did you know at this time which is July 12, 1971 that the Justice Department had already requested the FBI to search its indices to see whether or not Mr. Halperin had been overheard on the wire tap?

A No. I didn't know that. No, I am hearing that now for the first time.

Q Did you subsequently instruct Mr. Ehrlichman to take possession of those records from Mr. Mardian and to file them in his office in the White House?

A Yes. He told me that he was going to do so. I approved of it.

Q How long after your San Clemente meeting with Mr. Mardian was this?

A I don't recall the date. I think it was quite soon though, perhaps a month or two.

Q What were your directions to Ehrlichman in connection with taking possession of the records?

A To keep them safe and not to have them exposed.

Q Was there any discussion with Mr. Ehrlichman and Mr. Mardian concerning the possibility of an option to destroy those wire tap records in view of Mr. Ehrlichman's taking possession of them?

A I don't recall any discussion of destruction. I can certainly imagine that that was an option that could have [149] been exercised. Maybe it should have been.

In my view—many people have asked why I didn't destroy my famous tapes. I felt that evidence was evidence, and even though they had not been subpoenaed, so be it. They were not destroyed. They could have been.

Q Would there be a tape of your conversation with Mr. Ehrlichman in connection with his taking possession of the wire tap records?

A No. I think it occurred out here right after I had seen Mr. Mardian. As you know, there is no taping capability—we have no tape equipment in any of the —only in the White House, only two offices of the White House.

Q Turning your attention now to—

A None in the bedroom.

Q Turning your attention now to February, 1973, do you recall discussing a Time Magazine story concerning these wire taps with John Dean?

A Yes. There was some discussion of this story. I don't recall it specifically, though.

Q I would refer you again to Plaintiff's Exhibit J.

A Which page?

Q Did you agree?

MR. CHRISTENBURY: Which page?

Q BY MR. SHATTUCK: I am sorry. I believe it is the first page, page 1751. No, I am sorry about that. It is page 1752. Pardon me.

A Yes. I see something there.

[150] Q Did you agree with Mr. Dean that the Time Magazine story should be stonewalled?

A Yes.

Q What did that mean?

A Because there were inaccuracies in the story.

Q Was the story fundamentally inaccurate?

A There were inaccuracies in the story. We have found generally speaking, when you get into various publications that you can't go down the line and line by line say this is true and this is not true and et cetera.

My view is that there are inaccuracies in the story. I had not read it carefully.

Q The story was about these wire taps, the existence of these wire taps. Was that inaccurate?

A No. That part, no.

Q And did you approve the White House's denial of this story?

A I indicated that we should not comment on the story.

Q Do you know whether the story was in fact commented on by Mr. Ziegler subsequently to that?

A I do not have the information. You may have it. I don't have it here before me.

Q Did you believe that it would be embarrassing if these wire taps were confirmed, the existence of them?

MR. CHRISTENBURY: Well, I have a little trouble with that question. I can appreciate your earlier questions. But as to whether it would or would not have been embarrassing, I think [151] that that does not have any legal substance nor relevance as to our matter here.

MR. SHATTUCK: I would defer to my colleague, Mr. Slocombe for a response. He is the expert on responses.

MR. SLOCOMBE: The issue of good faith seems to be as to state of mind in denying the story. That is relevant.

MR. CHRISTENBURY: Well I think if you were to ask, as I believe that he did, why the story was denied and then I think the President responded. I agree with your point.

Whether it was or not embarrassing or what not I don't think has any legal substance. I would object and instruct the witness not to answer.

Q BY MR. SHATTUCK: Did you believe that it would damage national security to confirm the existence of these wire taps?

A At that point it could have been harmful, yes. But the story which basically, as I said, had some inaccuracies in it. Without seeing the story again and reading it all, I cannot respond to your questions completely.

Q In the absence of specific names and specific information, I would restate the question.

Would it have been damaging to the national security simply to confirm the existence of the wire taps in general?

A No. I believe that there had been some—that the existence of some wire taps was known.

In fact, I recall in some press conference responding about the number of wire taps we had compared with [152] the previous administration. What was not public knowl-

edge were the names of the people who were being wire tapped and it was the fact that the names of the people who were being wire tapped that I thought should not properly be commented upon, due to the fact that unless derogatory information was confirmed it would be unfair to that individual. In any event, I said unless derogatory information was confirmed, it would be unfair to the individual. Frankly, I had not had a chance to study the situation so as to reach a conclusion about them all. But just from reading this excerpt from the transcript, the story was denied because we could not and did not want to affirm a story that had some elements of truth but some elements of inaccuracy.

Q Do you recall any discussions you may have had in February or March of 19—

A Let me say that denials had nothing to do with Mr. Halperin.

Q Do you recall discussions you may have had in February or March of 1973 about the responses that Mr. L. Patrick Gray should make to questions about this Time story in his confirmation hearings as FBI Director?

A Is this about Mr. Halperin again?

Q This is about the Time story which referenced the wire taps.

A Any reference to Mr. Halperin? Any reference to Mr. Halperin's wire tap?

Q The question as stated refers to the wire taps of which Mr. Halperin was a part, that is correct.

[153] A Yes. I had discussions with Mr. Gray. I don't recall it at this point.

Q Was it in connection with his testimony at the confirmation hearings?

A Yes.

Q And concerning this Time Magazine story?

A I don't recall. I don't recall the conversation no. I don't recall the conversation with Mr. Gray being with regard to the Time Magazine story.

I recall just a general conversation about his duties as FBI Director as to whether he could get confirmed and how he could handle the problem and so forth.

Q Was this a face-to-face conversation or was it over the telephone?

A Yes.

Q Was it in your office?

A Yes.

Q In the Oval Office in the White House?

A Yes.

Q Would it have been taped?

A Yes.

Q Well, we have an outstanding motion pending before Judge Smith for tapes of this nature. I would simply observe for the record that this is—

A That is probably your best—

Q It is probably in one of the tapes.

A I can't really do it on the basis of my recollection. I remember when he was in the office. It would [154] have been taped in that period.

Q Do you recall Mr. Gray's testimony at his confirmation hearings that he searched the FBI records and found no record of these wire taps?

A No. I recall it now that you raise it. I recall the circumstances under which his name was withdrawn.

Q Do you know if anyone in the White House made an effort to inform Mr. Gray that the records of his wire taps were in fact in the White House?

A I can't help you on that question.

Q Was Mr. Gray's testimony on this subject misleading in light of the fact—

A I just told you I am not aware of the testimony. I am not aware of the contents of the testimony. I would have to see it again to—

MR. SHATTUCK: We will mark as Exhibit N a copy of the testimony of Mr. Gray before the Senate Judiciary

Committee. I will show you the question from Senator Kennedy on page 1756.

> "Did you talk to anyone about it at the White House or is it just a matter of your answer is 'I just checked the record and we didn't find any authorization and we didn't do anything else.'"
>
> The answer was:
>
> "MR. GRAY: That is my answer, that we checked the records and indexes of the Federal Bureau of Investigation, yes, sir."

A BY MR. SHATTUCK: And the question is does this [155] refresh your recollection of Mr. Gray's testimony on the subject?

A No. I don't recall reading the testimony.

(Whereupon the above described document was marked as Plaintiff's Exhibit N for identification by the Notary Public.)

(Brief pause.)

Q BY MR. SHATTUCK: Were you aware at some point during the spring of 1973 in approximately April of 1973 that Judge Byrne in the Pentagon Papers case had issued a series of orders requiring the disclosure of any and all wire taps to the defense?

A Yes.

Q Or their attorneys or consultants in this case?

A Yes.

Q Were you aware that that order ran to Dr. Halperin in it? In other words, that Dr. Halperin was named within the order as one of the persons?

A I was not aware of that, no.

Q On May 10, 1973, the prosecution in the Ellsberg case informed Judge Byrne that Daniel Ellsberg had been overheard, but that the records could not be located? Do you recall reading stories or otherwise?

A I learned about it, yes.

Q Did you participate in discussions about whether to notify the Justice Department or the FBI that the missing records were in the White House?

A Yes.

[156] Q Prior to the dismissal of this case, of the Ellsberg case by Judge Byrne?

A Yes. As a matter of fact, Counsel, you are quite aware of the fact I am sure because it was even published and might as well be public again and this will only make the a.m. papers, I am sure—but when this matter became an issue, it was brought to my attention by Mr. Kleindienst, then acting Attorney General and Mr. Peterson and the question was raised as to what about the wire tap files. I think it was on a Sunday afternoon. They asked me and I said to turn them over and they did at my direction.

Q Do you recall the date on which you had this conversation?

A No. No, that would be in the judge's record. It was on a Sunday.

Q Do you have it clear in your mind? This is a reference to the wire taps and not to the break in at Dr. Ellsberg's psychiatrist's office.

A Well certainly the break in was involved, as well. But the wire taps were also furnished. But I gave directions for both. I know it was done on both. I must say that that is thinking back. I am glad that Counsel remembered that there were two different problems. There was the problem with regard to the fact that there had been a break in and that was turned over. Then the wire taps were also turned over. I believe that was before the trial was dismissed.

(Discussion off the record among all attorneys.)

[157] THE WITNESS: Counsel informs me that I am in error. I am glad that we have the record, so we have the record straight. Actually, the wire taps—the judge dismissed the case. It was after that that the wire tap files were discovered and, not discovered—but were found again and liberated from Mr. Ehrlichman's office and were turned over to the court. So it was after the case was dismissed.

Q BY MR. SHATTUCK: Did you participate in discussions after the Justice Department notified the court that in fact, Dr. Ellsberg had been overheard and the dismissal of the case. Did you—

A At what period?

Q This would have been about a two-day period between May 10 and May 12.

MR. CHRISTENBURY: Excuse me, if we could consult?

(Conference of the record.)

THE WITNESS: I understand that it did not get there until after the case was dismissed. So, if any discussion took place it must have taken place after the deadline. But I approved sending them out.

Q You knew at the time that the Justice Department notified the court that there had been a wire tap but it couldn't find the records, that the records were then in Mr. Ehrlichman's office; is that correct?

MR. CHRISTENBURY: Is that a question or a statement?

MR. SHATTUCK: That is a question.

THE WITNESS: Then state it as a question.

Q BY MR. SHATTUCK: It is a question.

[158] A Don't put it in my mouth. I know you didn't intend to. Restate the question, if you will.

Q I would be happy to restate the question. The question is, did you know at the time that the judge was notified that Mr. Ellsberg had been overheard on a wire tap but the Justice Department couldn't find the records? Did you know that the records were in Mr. Ehrlichman's office?

A At what time? When would it have been?

Q Just after the judge was notified.

A After the case was dismissed?

Q No, after the judge was notified before the case was dismissed.

A I don't recall. I can't recall. If I was asked, I would have said so. I would have told them so because when the Attorney General and Mr. Peterson informed me that we should turn over the information with regard to the break in, I directed and had they asked me about this, I would have told them so. I don't know whether they did or they did not. If I were asked I did. But I can't recall it at this point.

Q Did you know through this period and I mean by that from the time when you had directed Mr. Mardian to turn the records over to Mr. Ehrlichman and then he had brought them to the White House, did you know throughout that period which was approximately a year and a half that the records were in the White House?

MR. SCHWARTZ: Excuse me. I think that is a misstatement. I don't think the testimony was that the President directed Mr. Mardian to turn them over. I don't think [159] that that was the testimony. I think the testimony was that Mr. Ehrlichman asked and they were permitted to be brought over. I don't think the President testified he ordered Mr. Mardian to bring them to Ehrlichman's office. Maybe that is why the question might be ambiguous.

MR. SHATTUCK: I appreciate Counsel's observation. I would ask the question segmented.

Q BY MR. SHATTUCK: Did you instruct in July of 1971, Mr. Mardian to turn the records over to or to take possession of the records from Mr. Sullivan and then subsequently to turn them over to Mr. Ehrlichman?

A Mr. Mardian said he wanted to—he thought he should bring the records to his office. Then he had a discussion with Mr. Ehrlichman, as I recall and said that he thought that they should go to Mr. Ehrlichman's office. I think Counsel for Mr. Ehrlichman—

MR. SCHWARTZ: Yes.

THE WITNESS: Mr. Schwartz, I am sorry. I don't recall my telling Mr. Mardian to deliver the records to Ehrlichman's office. Is that Ehrlichman's recollection? I don't quite get your question there.

MR. SCHWARTZ: I was not asking a question. I simply wanted the record to be clear that the question assumed a fact which was not in evidence, at least you had not testified to it. This was only for clarifying the question.

THE WITNESS: Right. I cannot really tell you whether or not Ehrlichman initiated it or Mardian initiated it or the two together. All I know is that Mardian felt that he didn't [160] want them in the Justice Department and brought them to the White House and Ehrlichman kept them in his office. That is what happened to them.

Now the second point I think which goes to the heart of your question is that as far as the wire tap material was concerned, I had no knowledge that there was information in the wire tap file which would bear on the Ellsberg trial and so when we talked—because you see you are getting back to the series of questions you asked me about the conversation Dr. Halperin had with Dr. Ellsberg when the dope was mentioned in getting a baby sitter and all of that stuff that was discussed and I told you the only recollection I have with regard to Ellsberg was rather—shall we say—esoteric. That was from Henry Kissinger, based on his own knowledge and not based on information relating to anything that he had seen on the wire taps. He didn't have to have the wire tap. He had seen it firsthand. That is why he said that he was brilliant and he said those things and some other things—that depends on your point of view. Sometimes people can be on dope—but whatever the case might be, he was bright.

Now insofar as the wire tap files are concerned and the Ellsberg case is concerned, they would have had in my view, no bearing whatever on the decision Judge Byrne reached before he even got them and certainly there was no intention on our part to move the files from the Justice Department to the White House because we were afraid or somebody was afraid that there was one overhear in there involving Halperin and Ellsberg that might taint the Ellsberg [161] trial. I am stating that as a fact, as far as my recollection is concerned.

Q As of May 10?

A Now that is inconsistent with your theory, but that happens to be true.

Q As of May 10, 1973, did you know that Dr. Halperin had in fact, been wire tapped?

A As of May 10?

Q Yes.

A I don't recall.

Q As of May 10, 1973?

A May 10, 1973? I don't recall.

MR. CHRISTENBURY: Mr. Shattuck, I think that there is a question as to this. He recalled it at the time. I think he testified that he had knowledge back in 1969—

THE WITNESS: Halperin's wire tap, not Ellsberg. But Halperin—I know Halperin was wire tapped back in 1969.

Q And did you know—

A Incidentially, he was wire tapped not only because Dr. Kissinger put him on his list but because Mr. Hoover urged that he be put on the list.

Q Did you know from reading the paper or from otherwise receiving a communcation that Judge Byrne had ordered that the wire taps on Halperin be turned over on May 10?

A No. I didn't follow the trial that closely.

Q Did you ever discuss the Halperin tap with David Young?

A No, not that I can recall.

[162] (Conference off the record.)

MR. SHATTUCK: I have no further questions.

MR. CHRISTENBURY: I have just three brief questions.

EXAMINATION

BY MR. CHRISTENBURY:

Q Mr. President, in May of 1973 and prior to that, did you at any time know that the court in California in the

Ellsberg case had directed the government to disclose whether Dr. Ellsberg or Dr. Halperin had ever been overheard on an electronic surveillance?

A I cannot recall. I cannot recall. If there is any testimony to that effect that might be able to refresh my memory—but I have no independent recollection of that, no.

Q Two other brief questions with regard to the termination of this surveillance on Dr. Halperin. Did you know of your own knowledge who authorized that termination of the surveillance on Dr. Halperin?

A No. I don't know of my own knowledge of that.

Q Specifically, do you know whether or not Mr. Mitchell authorized the discontinuation of the surveillance?

A No. As I indicated in earlier questions, I assumed Mr. Mitchell as the Attorney General would have authorized the termination since the Attorney General authorizes the institution.

However, I don't know of my own knowldge whether he authorized it or didn't authorize it or whether he [163] knew about it. I don't know.

MR. CHRISTENBURY: No further questions.

THE WITNESS: The other point I think should be understood though is that this question that you asked relating to—

MR. CHRISTENBURY: The court order?

THE WITNESS: The court order on the Halperin wire taps, I simply haven't any independent recollection. I do not recall. The only thing I know is that I had no concern and no knowledge of it. I had no knowledge of turning over the Halperin wire taps.

I knew Ellsberg was not on that wire tap list and there was one conversation which I think just as well did not become public because it might have been embarrassing to all parties concerned.

That was one conversation. But I didn't know about that. I don't see any reason why Dr. Halperin or Ellsberg would want it known.

Q BY MR. CHRISTENBURY: But specifically during this time you did not know of the court order to require the government to disclose the electronic surveillance, if any, of Dr. Halperin?

A I don't recall being informed of it. If I was informed of it, I would have complied with it because I would have said to get the tapes wherever they are or the summaries and send them out to the court, just as I followed the recommendation of my Attorney General and Deputy Attorney General in sending out the information with regard to the break in.

[164]

EXAMINATION

BY MR. SCHWARTZ:

Q Mr. President, I just have a couple of questions to clarify. Did I understand you to say that after the San Clemente meeting, Mr. Mardian came out on the question of what disposition was to be made of the logs? Did I understand you to say that your recollection was that the course of action to be pursued was that the tapes were going to be — the logs should be provided or that they should be taken from the Justice Department or was the matter resolved at the time of the July San Clemente meeting?

A That was a hypothetical question Counsel asked whether or not we considered the option, as I recall, of destroying the logs over preserving them and so forth.

My answer was that I am not confident that there might have been discussions, but that insofar as bringing in the fact of my own tapes, some wondered why I did not destroy them as I could have. I said I did not.

As far as this was concerned, nobody seriously considered destroying these summaries. The decision was made that they should be removed. Sullivan would deliver them to Mardian and then later on he would deliver them to Ehrlichman. How that transfer worked out I do not know.

But knowing Ehrlichman, I know Ehrlichman would [165] have been absolutely circumspect with regard to seeing that they were not tampered with in his possession.

Q As to the resolution made in the San Clemente meeting, the original July San Clemente meeting, that was to have the tapes transferred from Sullivan to Mardian; is that correct? Was that the decision that was made?

A Yes. Mr. Mardian was to pick them up.

Q Mardian was to get them. Now was a resolution made at San Clemente as to the logs that were to be transferred to the White House or was that made at a later meeting that you referred to?

A I think it was made at a later meeting. But, it could have been made at San Clemente. It was just brought to my attention—I don't recall that specific meeting. We have no records. I think Mr. Mardian and Mr. Ehrlichman had a conversation and worked that out.

Q In answer to one of Mr. Shattuck's questions, you indicated you thought that Ehrlichman had talked to you at San Clemente about Mardian's discussion. Is it possible that that discussion did not occur at San Clemente?

A I think I stand corrected.

It depends how long we were here at San Clemente at that time. I think it was a rather long stay. It is possible that we could have talked at San Clemente. It is also possible that it did not occur until later when we returned to Washington.

Q Would it refresh your recollection if I told you that Mr. Ehrlichman has testified previously that in fact, [166] the tapes were not—the logs were not transferred from Mardian's office to Ehrlichman's office until late September or early October of the same year?

A Then my recollection with regard to the San Clemente meeting is wrong. It was later at the White House or at Camp David or wherever we were. If I participated in a discussion and it took place then and not out here, that is correct.

Q Now you also said that you thought that you had a discussion with Ehrlichman or Mardian where the decision was made to in fact, transfer the logs from Mardian's office to Ehrlichman's office.

A I think that discussion was with Ehrlichman. It could have been with both. But, my recollection is that it was with Ehrlichman. But I actually do not recall. The notes may show it. I have no notes of what occurred at that time.

Q Would it refresh your recollection if I told you that—I don't have the page number. But Mr. Ehrlichman's testimony was that after Mr. Mardian had approached him, some 60 days or so after the July San Clemente meeting and said he wanted to transfer them to his office, he testified that he went and spoke to you and you said, "Why don't you do it?"

Would that refresh your recollection about who was at the meeting?

A Yes. That's right. It was Ehrlichman. That is exact. He is very precise in his notes. His recollection, I think would be accurate. That is undoubtedly the way it happened.

[167] Q Then you said that it was okay and then—

A Yes.

Q You said that that was what they ought to do?

A Yes. To me it was just a matter of getting them in a safe place where the possibility of their being used in an improper way or of their leaking and so forth would be reduced. I emphasize again it was not because I had any concern about any specific log involving Dr. Halperin.

MR. SCHWARTZ: Thank you, Mr. President. I have no further questions.

(Whereupon it was stipulated by and between all counsel present that the deposition may be signed before any Notary Public.)

/s/ _____

WITNESS

STATE OF CALIFORNIA

ss.

County of Los Angeles

I, Sally Yerger, C.S.R. and Notary Public for the County of Los Angeles, California, certify:

That the foregoing deposition of RICHARD M. NIXON was taken before me pursuant to Notice and Court Order at the time and place therein set forth, at which time the witness was put on oath by me;

That the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me, and were thereafter transcribed;

That it was stipulated by counsel that said deposition may be read, corrected and signed by the witness pursuant to Rule 30 (e) of the Federal Rules of Civil Procedure;

That the foregoing deposition is a true record of the testimony and of all objections made at the time of the examination.

I further certify that I am neither counsel for nor related to any party to said action, nor in anywise interested in the outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name and affixed my seal, this 24 day of January, 1976.

/s/ _____

SALLY YERGER

Notary Public in and for the County of Los Angeles, State of California

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STATE OF CALIFORNIA
ss.
COUNTY OF

That on , 19 , the foregoing deposition was submitted to RICHARD M. NIXON, the witness, for examination and was read by the witness, at which time any changes desired were entered upon the deposition, and that thereafter the deposition was signed by the witness before me.

/s/ _____
Notary Public for the County
of
State of California

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS

Washington, D.C.
Thursday, June 19, 1975

Deposition of JOHN N. MITCHELL, a Witness herein, called for examination by Counsel for the Plaintiffs in the above-entitled action, pursuant to notice, the Witness being duly sworn by JOANNA B. LICHTMAN, a Notary Public in and for the District of Columbia, at the offices of Caplin & Drysdale, 1101 Seventeenth Street, N.W., Washington, D.C., at 2:05 o'clock p.m. Thursday, June 19, 1975, and the proceedings being taken down by Statement by JOANNA B. LICHTMAN and transcribed under her direction.

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ALSO PRESENT:

Dr. & Mrs. Morton H. Halperin

[4]

PROCEEDINGS

Whereupon,

JOHN N. MITCHELL,

a Witness herein, called for examination by Counsel for the Plaintiffs, having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. SLOCOMBE:

Q Mr. Mitchell, when you were Attorney General in the early months of 1969, did your functions include the approval of national security wiretaps?

A They did.

Q Did you establish a procedure when you took office with respect to such wiretaps?

A I'm not quite sure that I understand what you mean by procedures. You mean procedures for the submission of material for my approval?

Q Yes.

A Approvals were made by me after submission of a request for authorization by the Director of the Federal Bureau of Investigation.

Q Could you describe the—did you give instructions with respect to what you wanted included in the submission that [5] was made to you?

A I did not. I reviewed the practice that was in place when I arrived at the Justice Department, and we continued to follow that.

Q What? On the basis of that, what was normally included in a request for authorization of a national security wiretap that came to you?

A The reasons why the party requesting the tap felt that it was necessary in the interests of national security.

Q You speak of the party requesting the tap. How was that party identified?

A Well, it would be identified in various ways. Sometimes it would be initiated directly by the Federal Bureau of Investigation, and sometimes by other agencies of the government.

Q If it was initiated by another agency, would that agency be specified by name, or would an individual in that agency be specified?

A My best recollection is that it probably happened in both instances, but if it was by name, it would be clear as to which agency was involved in the request.

Q But if it was by name, it would also be clear that if it said Secretary Laird has requested that a tap be put on such and such a place, that would clearly convey to you that it [6] was indeed Secretary Laird; if there was a person identified, your understanding was that that was a person who had, in fact, made the request to the FBI?

A Well, that would be the normal process where a name was involved, yes.

Q You said that the request included the reasons why it was necessary for the national security.

Could you describe what kind of information you expected to receive or you insisted on receiving before acting on a request? Was it simply a formal recital that in the interest of national security I request a wiretap or was there some substantive information as well?

A I think you've just put a few words into my mouth. I said in some instances. If not, that was what I intended to say.

Frequently, of course, the matters would be discussed orally with the individual requesting the tap or with the Director or his assistants in the FBI relating to the conversation between the Director of the FBI or somebody else in the FBI and the party making the request for the tap where the materials would be outlined. At other times it would be a statement in the request for the authorization as to the reasons for it or the persons requesting it.

[7] Q But it was your practice to have received either orally or in the request itself a fairly full substantive description of why the request was being made before you would approve it?

A I don't think it was necessary to have a full substantive statement as to the—the matter need not be full. They would outline the reasons for it very briefly and simply and this would be particularly true in instances where there had been prior oral discussions on the subject matter prior to the time the request came over to me from the Bureau.

Q Did the request that came to you include a statement as to why this particular subject had been selected for wiretapping?

A Sometimes they did and sometimes they didn't. It would generally be the basis on whether there had been the oral discussions prior to the submission of the request.

Q You mean that sometimes you would know from prior discussions why this particular individual was being tapped in this connection?

A That is correct.

Q Did the request that came to you include a statement as to whether the requestor believed a wiretap as opposed to some other investigative procedure was necessary?

[8] A In some cases yes.

Q And what cases did not include such a statement?

A Well, in wouldn't include a statement in cases where the oral conversations had made determinations, had made determinations that that was the basis upon which to proceed.

Q When you had one of these oral conversations, did you make a practice of making a memorandum of that conversation or in any other way reducing it to writing so it would be reflected in the record of that particular wiretap?

A I did not.

Q Did the request include any statement as to the expected duration of the wiretap?

A Some did and some didn't.

Q Was there any pattern as to whether they would or wouldn't include statements?

A I think the only answer I can give to you in that case is that in most national security taps they were on for very extended periods and it was assumed that the taps would be handled in accordance with the policy that had been established in the Attorney General's Office with respect to the request for renewals of the taps.

Q I'd like to come back to the question of renewals, but if we can put aside those national security wiretaps which [9] had to do with the gathering of foreign intelligence information, as opposed to the actual specific acts of wrongdoing, did those, were those requests treated in a different way?

A Well, let me point out that with respect to your first statement, or in your question, that doesn't necessarily mean they're exclusive, as you're well aware.

Q I understand.

A There can be what you refer to as gathering of intelligence and also the ascertaining of people who were engaged in wrongdoing. There was to my recollection no distinction between the two, as you have stated.

Q Was any distinction drawn in the period May of 1969 between taps on United States citizens and taps on foreign nationals?

A With respect to what?

Q With respect to the procedures that were necessary before such a tap would be instituted?

A No.

Q Would you describe the procedure which, did you establish a procedure with respect to renewals and renewed authorizations for national security wiretaps?

A There was either in existence or I established a procedure under which after a period of time which—my [10] recollection is it was 90 days—if the tap was to continue a resubmission was made by the Director of the FBI in

which would be listed, of course, the period of the existing tap, plus a reference to the effectiveness of the tap or an outline of the reasons why it was requested it be continued.

Q When you received one of these requests for a renewal and the original tap had been requested by another agency, did you regard yourself as under an obligation to make an independent judgment whether to continue the tap?

A Well, I made a judgment. It might very well be based on the recommendation of the other agency, but I made the judgment.

Q Would that also be true of the initial decision to institute a tap that even though the requests were made in the name of the Department of Defense to continue our example, you would take that recommendation into account, but you were the person who was responsible for making the choice.

A Well, if you confine it to this illustration that you use in connection with the Department of Defense, yes.

Q Your answer suggests that there is another illustration under which you wouldn't feel under obligation to make an independent judgment.

A Well that is correct if I had instructions from [11] higher authority.

Q Well who would be higher authority?

A Well, outside my wife, the President of the United States.

(General laughter.)

Q Were there occasions when a security tap, a national security tap, was in operation when you received reports other than reports on the fruitfulness of the tap that was contained in the renewal?

In other words, did you from time to time receive reports of the fruits of a wiretap?

A In varying degrees and occasions, yes. I did not receive all of the reports on the fruits of all wiretaps. There

were instances where the Department was directly involved in which I would get them. There were the other instances in which summaries would be provided to me or matters of personal interest that the Director, or whoever was preparing the documents for the Director, would feel that the subject matter would be of interest to me.

Q Do you understand that the procedures which you used differed in any significant way from the practices of your predecessors with respect to national security wiretaps?

A I believe that they were the same and I base that [12] belief on a review of the process with my predecessor, which we went over personally and with a review of the files that were in the Attorney General's office when I arrived.

Q And the highlights of that process were first that when the request came to you it identified the requestor if it was other than the FBI?

A That's correct.

Q That either the request itself included a statement of the reasons why a tap, as opposed to some other investigatory procedure, was necessary or you had obtained that information through an oral conversation with somebody else.

A That is correct.

Q And that there was a procedure for regular renewal which included an evaluation of the usefulness of the tap up until the point of the renewal.

A There was a procedure for renewal under which the request for the renewal would customarily contain an evaluation of the circumstances.

Q What do you mean by an evaluation of the circumstances?

A Well, it would depend upon the individual case that was being processed at the time. It might refer to the nature of the ongoing desirability of such a tap or it might contain information that had been obtained through the tap which [13] justified their request for the extension.

Q Did the occasion ever arise in which nothing useful had ever been obtained from the tap during the initial 90-day period in which you received your request to continue the tap nonetheless?

A Oh, yes, many of them.

Q And what was the basis that was given for continuing those taps?

A The nature of the subject being tapped and the potential for obtaining information in the future.

Q Would it be correct to say that you would have expected, if nothing useful had been obtained in the initial period you would have expected some affirmative statement as to why it was necessary to continue the tap before you would approve a renewal?

A Well, that would depend entirely on the circumstances, the situation where the tap was being placed.

There are institutions in which a continuity of tap is most desirable. There are other cases where they are non-productive and there are withdrawn.

Q But if the subject of the tap were an institution, although nothing useful had been turned up in the last 90 days, the nature of the institution which justified the initial tap, [14] that would be reflected in the renewal recommendation to you, that would be in the statement that the initiator wanted to go on?

A Well, it might or it might not be. It might be an institution where, based on my own information in respect to it it would be desirable and I would authorize its continuance.

Q This 90-day renewal recommendation was in writing?

A To my recollection, which is very vague on the subject matter, is it was a directive from the Justice Department to the Federal Bureau of Investigation.

That is my recollection. I'm not certain.

Q Establishing the general procedure?

A Establishing the general procedure with respect to renewal.

Q And each specific renewal request was in writing?

A Yes.

Q And it required your signature before the tap would be continued?

A That is correct.

Q And just for the record, though you in fact personally signed these, both the initial request—it was your general practice that you signed these initial requests?

A To my knowledge every national security tap that was [15] authorized while I was in office I personally signed.

Q Did you give any instructions with respect to record-keeping on the national security wiretaps?

A Instructions?

Q Let me ask you in a different way. Were you aware of the practices with respect to the records which were kept on national security wiretaps, whether or not they resulted from your affirmative instructions or from the carry-over of existing instructions you found when you came into office?

A Yes, there was a straightening out, I think, is the best way to put it, of the records that were maintained in a safe in the anteroom of the Attorney General's office to provide a complete index and chronology of the existing national security taps and a filing of the references to the national security taps, which was also maintained in this particular safe.

Q This was—these were the records which were kept in the Justice Department as opposed to the FBI?

A That is correct.

Q Were you aware of the FBI's practice with respect to records on these taps?

A I was not.

Q Did you know whether a practice was made of recording [16] in the so-called ELSUR index the persons that were overheard on national security wiretaps?

A First of all, the word ELSUR did not mean anything to me while I was at the Justice Department. I've since read it or heard of it.

Secondly, I had no detailed knowledge of the filing procedures of the FBI.

Thirdly, there had been a number of discussions with me while I was Attorney General about the methods by which the Federal Bureau of Investigation would make available to the Criminal Division or U.S. Attorneys or others involved information with respect to overhearings.

Q And what did you understand to be the raw materials from which they drew the information made available to the Justice Department?

A Well, their files in whatever form they were kept and from whatever source they came, depending on whether it was the actual tape or whether it were memorandum prepared from the tapes by people overhearing the conversations.

Q Did you have any knowledge of whether the FBI made a regular practice of indexing the information which they obtained through wiretaps?

A It was assumed by me that they did because of the [17] response that came from them from time to time in connection with various proceedings.

Q Apart from the wiretaps, the so-called 17 wiretaps, one of which is at issue in this litigation, prior to May of—1968.

THE WITNESS: Can I go off the record for just a minute?

MR. SLOCOMBE: Yes.

(Discussion off the record.)

BY MR. SLOCOMBE: (Resuming)

Q For purposes, without committing anybody, as to whether there were or were not 17 wiretaps, or what's at issue in this litigation, the 17 wiretaps means the Kissinger wiretaps, the ones which include the Halperin wiretap as distinguished from the regular national security wiretaps.

Apart from this class, were you aware of the use of wiretaps in other efforts to detect the source of leaks of national security information?

A The answer to your question is yes.

Q Were the procedures used in initiating the wiretaps in those cases the same as those which you have described as applicable in other national security cases?

A Yes. You say the procedure, based on the procedures that I've previously testified to, yes.

Q The ones that you've just described, describing the [18] requests for the regular renewal?

A Yes.

Q Those procedures were used for leak taps, as well as for other kind of offenses?

A That's correct.

Q Did the FBI have a practice of asking the Justice Department if it would agree to prosecute prior to recommending the tap of a leak suspect?

A To my recollection there were no such discussions that I participated in.

Q When a tap was used in a normal case in connection with an effort to detect the source of leaks were other investigative procedures undertaken as well?

A In some cases yes and in some no.

Q In what cases would other investigative procedures not be undertaken? I don't mean by name but what would govern a decision not to do anything other than put a tap on?

MR. HUNDLEY: In leak cases?

BY MR. SLOCOMBE: (Resuming)

Q In leak cases.

A Well, there would be a number of factors. Number one, what was the product of the tap, what were the circumstances involved, what were the individuals that were the subject of the [19] investigation? There could be a number of circumstances.

Q I'd like to turn now from the general procedures to this particular wiretap.

Do you recall a meeting between, in the latter part of April, apparently on April 25th at Camp David, between yourself and President Nixon and J. Edgar Hoover?

MR. HUNDLEY: What year, sir?

BY MR. SLOCOMBE: (Resuming)

Q 1969.

A I've done some research on this based on my logs. I've answered this question in previous cases and I'd like to make reference to my notes.

(Pause)

A In answer to your question I can state that my logs maintained in the Justice Department show that I was at Camp David in the afternoon and evening of April 25, '69 and the morning of April 26, 1969, but I have no independent recollection of Director Hoover being there or of any discussion in this area.

Q Do you have a recollection of any meeting attended by you, Director Hoover, President Nixon, and Dr. Kissinger during approximately this period of late April or early May, 1969?

[20] A I don't have a recollection of any single, specific meeting at which those four people that you named were present.

Q Do you recall any discussion of the question of leaks in this time period?

A Yes.

Q Could you describe those discussions?

A To the best of my recollection I recall discussing with the President, with Dr. Kissinger, and with Director Hoover the subject matter, not necessarily at a single meeting but discussing the circumstances that prevailed at that time with respect to the leaks that had so concerned Dr. Kissinger and the President.

Q And what was the gist of those discussions?

A Well, the gist of the discussions were that the leaks were harmful to the national security and the foreign policy of the United States, and that it was eminently desirable to find out where they were coming from and to do everything possible to stop them.

Q Was there specific discussion of wiretapping in that connection?

A There was.

Q What was the gist of that discussion?

A Well, my recollection is that Mr. Hoover pointed out the [21] fact which to me was obvious, that the most immediate means at hand were to use wiretaps in order to help the process that was being undertaken.

Q Did he explain why it was the best way to do it?

A I have no specific recollection of it but I believe it was pretty obvious to those who had participated in the subject matter of the discussions that wiretapping would be the quickest and best way.

Q What was it about the use of wiretapping for this kind of problem that made it obvious it was the best way to do it?

A Because all through the history of law enforcement it's been found to be the best source of information on a subject like this.

Q Was there any discussion of individuals who might be responsible for the leaks?

A Yes, there was discussion of that subject matter.

Q Do you recall whether Dr. Halperin's name arose in connection with that discussion?

A I have a recollection that it did, yes.

Q Who raised the name?

A I'm not certain but I believe it came, I have a recollection that it came under a review of people who were [22] either on the National Security staff or in the other departments like State and Defense that had access to materials that might be the subject of the leaks.

Q Do you recall any other names which arose in a similar connection?

MR. CHRISTENBURY: Excuse me, Mr. Slocombe. So that I understand your question, are you seeking general discussions of people who might have been involved in leaks or people who were the subject of or who were being considered for the subject of an electronic surveillance?

MR. SLOCOMBE: If I understand your question, the former; that is, who, did other names arise as to people who might be responsible for the leaks—

MR. CHRISTENBURY: I guess that—

MR. SLOCOMBE: Well, we haven't yet established that Dr. Halperin was identified as a person who was selected for wiretapping in these discussions.

MR. CHRISTENBURY: I guess my problem is, of course, as you can appreciate in the area that we have traditionally taken a position that other people who were wiretapped during this period, that information is irrelevant to this litigation. If you can steer your questions apart from disclosure of that information, I think that would be—

[23] MR. SLOCOMBE: I haven't yet asked who they were but I might. Mr. Mitchell has not yet said anything about connecting wiretapping individuals. He's described the discussion of a number of individuals who had access to information. I've asked him whether he recalls whether anybody else's name was mentioned in that connection.

MR. HUNDLEY: And I think he answered yes.

[24] THE WITNESS: Well, I will, on advice of Counsel.

MR. HUNDLEY: Well, I will object. I don't object his answering yes, other names were mentioned, but I think I would instruct him not to answer what the other names were. He'll answer all questions about, you know, Mr. Halperin and what not. But I just don't see the relevancy of getting into other people who might have been considered in this regard.

MR. SLOCOMBE: Well, I would like to ask a number of questions which I think will not involve anybody else's name.

MR. HUNDLEY: That will be alright.

MR. SLOCOMBE: Then we'll come to question of the other names.

MR. HUNDLEY: Fine.

MR. SLOCOMBE: (Resuming)

Q The people who were discussed, were they also other people who were described as having access to the information which had been leaked?

A My recollection is that they were.

Q Was it a large number of people?

A My recollection is that there were a large number of people. We are going back to the circumstances under which Mr. Halperin's name—or is it Dr. Halperin—Dr. Halperin, excuse me—Dr. Halperin's name was discussed as you have raised.

[25]Q That's right.

A And to answer your question fully, there were a substantial number of people discussed at that time or times. But it was reduced to a lesser number for purposes of concentration than the total number discussed at that time, if I make myself clear.

Q In other words, the initial discussions were of how many people know about such and such a subject which has been leaked.

A I think that is a reasonable characterization.

Q And the answer was a substantial number.

A There were a substantial number discussed as potentials, not a substantial number that knew about the subject matter.

Q Who was it who, among the four of you at this meeting, or series of meetings, who had personal knowledge of who had access to various kinds of national security information. Did you personally?

A I did not.

Q To your knowledge, did Director Hoover?

A I do not recall the Director initiating any names for discussion.

Q So it was presumably either President Nixon or Dr. Kissinger?

[26] A I think that is a reasonable presumption.

Q As between those two, did President Nixon identify individuals within the NSC staff, the Defense Department, the Air Staff and the State Department, who, of his own knowledge, had access to information?

A It is my recollection he did, in a limited way.

Q What do you mean in a limited way?

A That his subject matter in this area was not as wide and broad as Dr. Kissinger's.

Q If I understand your description correctly, as these discussions progressed, you either by name or by category understood that a relatively large number of people had access to the information?

A No, that is not correct. My answer was that there was a substantial number of people discussed. There was a more limited number of people who were discussed in the light of the potentials of having access to the information.

Q I see.

In approximate terms, how large was that more limited number?

A I want to make it clear that this was not just one meeting at which the total panoply of individuals discussed. This happened over a period of time.

[27] And it would be my recollection—you question was the number of people that had access to the information?

Q Yes.

A Perhaps there was somewheres between 6 and 10 in the initial discussions. And that is my best recollection.

Q And that was represented to you and Director Hoover as the full list of people who had access to the information?

A I do not know what was represented to Director Hoover because I may not have been at a meeting with Director Hoover on the subject.

Q I stand corrected. That was represented to you as the full list.

A That is correct.

Q What were—

A Excuse me, may I go back—you say full list. I have already testified to the fact that there were others discussed from time to time following these initial discussions.

Q But in this initial stage, I understood you to say, you talked about a lot of people who might have access and then narrowed it down to a smaller number of people who might have potential access.

A Not that I individually concluded, but the four who had knowledge concluded.

[28] Q Well, the group concluded.

A Well, it was not a group as a group. And the representations made to me were a number of roughly 6 to 10 that would be my best recollection.

Q What was the subject matter of the leaks in question?

A Well, in connection with what?

Q With these discussions.

(Pause)

THE WITNESS: Do I have to get permission from the Justice Department to answer that?

(Discussion off the record.)

THE WITNESS: Okay. Do you want to read back the question, or do you want to restate it?

MR. SLOCOMBE: (Resuming)

Q In essence, can you identify the leaks, the subject matter of the leaks where you were trying to identify who had access to the information which was leaked. What were the leaks about?

MR. HUNDLEY: Well, we would like to confine our answer to the subject matter, which is your question at this point. Go ahead and answer that question: the subject matter.

THE WITNESS: Well, the initial concern, of course, had to do with the United States policy and activities in [28] relationship to Southeast Asia, specifically with respect to the United States' policies and activities in the Cambodian matter.

There were also considered at this time and in the succeeding days and months other policies of the United States that were being formulated in a new Administration.

MR. SLOCOMBE: (Resuming)

Q By the Cambodian matter, do you mean the bombing of Cambodia?

A That is part of it, yes, sir.

Q When—these discussions took place, prior to the first request to you for an authorization for wiretapping?

A That is correct.

Q Did the names on this short list of potential, I want to be clear, this relatively limited list of six or eight names, was it people who were identified simply as potentially having access to the information which had been leaked? There was no further characterization of them, that they were the most likely people to have been leaks?

A Well, I am sure there were discussions on the subject matter of the likelihood and the desire to—

Q I understand that but I am trying to trace the procedure by which you narrowed down the list. If I understand it, you began with a relatively large list, a substantial number of [30] people who might have access. You then narrowed it down, if I understand your testimony, to six or eight people who the people knew informed you were the ones that did have access.

A That had access?

Q Right.

A Access does not mean that they were to go into the files and look at it, but it's also that they could get it from people who had access to files.

Q It was represented to you that there were only six or eight people in the United States Government who, on that definition of access, had access to information about the Cambodian—

A No it was not. And I have testified to the contrary. I will go back again and tell you with respect to the six or eight, that was the number that was selected for the purposes of the original surveillance, wiretapping, examination, questioning, whatever the matter was.

Q Then I have misunderstood your testimony and I apologize.

What was the basis—before we come to the question of how you narrowed it down—how many people did you understand had access in the sense which you described, without regard to motive or other reasons to believe that they might be [31] responsible for the leaking?

Did you reach an estimate of the number of people who had access to the information?

A There were wide and general discussions. But I can't tell you as to what number had access to it.

Q What were the criteria you used to narrow down from the broader class of people who had access to the information the six or eight whom you identified as the people to be subject to investigative procedures?

A Let me again say that this was not an elimination contest to say it had to be within this six or eight. It was a review of the circumstances to make a determination whether the six or eight were likely candidates, not excluding the possibility that there were others that had access to, that might have had desire, reason or motive, might be doing it. I don't want to leave that impression it was just cut off at the pass with just the original six, or whatever the discussions were involved with.

Q From what agencies did the people who had access come?

A Well, I remember distinctly the National Security Council Staff, the State Department and the Defense Department. There may have been other agencies. Possibly the Central Intelligence Agency, but I do not recall at this time whether they were so discussed.

[32] Q With respect to the Cambodian bombing, did they include the Air Staff?

A Well, that would be part of the Defense Department. If I understand your designation, that would be the Air Force.

Q The Washington headquarters within that Defense Department, rather than just within the office of the Secretary?

A That is correct.

Q You mentioned desire and motive as among the criteria which you used to narrow down this list. What did you mean by that?

A Well, I meant by that there were representations made as to the feelings of some of the individuals involved with respect to whether they approved or disapproved of the Administration's foreign policy and it's policy in the Vietnam theatre.

Q And I take it that the people who were believed to disapprove of the policy were regarded as, if I have your phrase correctly, potential candidates for investigation.

A I think that is a fair statement. Yes, sir.

Q How was it determined that they disagreed with the policies of the administration?

A I believe that the representations were made either by Henry Kissinger or the President.

Q And, did they convey to you any of the reasons, any [33] of the evidence which had lead them to those conclusions?

A I am sure that they probably did, yes.

Q Can you recall any of the substance?

A I cannot recall any of the substance of it at this late date.

Q Do you remember wheather any of the characterization of these six or eight as people who disapproved of the Administration's foreign policy came from Mr. Hoover?

A I do not. I do not believe that the discussion I had with Director Hoover got into this area.

Q Did any of these conclusions come from you personally?

A They did not.

Q Will you identify to the best of your present recollection who those six or eight people were?

MR. HUNDLEY: I think I would object to that. At this point the question would be confined pretty much to Dr. Halperin. I don't see any relevancy to identifying—

MR. CHRISTENBURY: The Federal defendants would join in that objection. I think Mr. Mitchell has responded fully as to the criteria and many of the bases which they considered. I think these are the facts that are relevant to this litigation. As to the identity of specific individuals that may or may not have been included, I simply do not believe is relevant.

[34] MR. SLOCOMBE: Well, Mr. Hundley and Mr. Christenbury, as you know, it is our position that one of the fundamental issues in the case is why Dr. Halperin was selected. And it seems to us highly relevant to that question who else was in the class that he was put in. And that the validity of that class and how that class was assembled, as well as how he was included in it, and what happened to the other people who were in that group is critically relevant to the legal status of the choice that was made to put a wiretap on his home telephone. And for that reason, we press the question.

(Pause)

MR. HUNDLEY: Excuse me, I have just conferred with my client, and we will answer the question. I'm sorry.

THE WITNESS: The answer is I do not recall.

(General laughter)

BY MR. SLOCOMBE: (Resuming)

Q Do you remember whether Dr. Halperin was one of the—

A Yes, I do.

Q Can you help me as to whether you remember that with the subsequent controversy about his tap or whether you have an independant recollection, whether it is something that you have had on your mind going back to 1969.

A My present recollection is that I had an independant [35] knowledge of it that goes back to 1969, but, as you are well aware, you hear so many of these things. But that is my present recollection, that I did have a direct recollection from the discussion at that time.

Q Can you recall whether Daniel Davidson was one of the names.

A I do not.

Q Colonel Pursley?

A Colonel, it's Piersley, isn't it?

Q Well it's spelled Pursley.

A Well, isn't he a General? Wasn't he Mel Laird's Secretary or Chief of Staff or whatever? Well, I think—I guess we are talking about the same fellow.

Q Yes.

A His name was discussed at some time in this time frame but I can't say that it was in the initiation of these discussions with respect to indivduals. It may have been at a later date. How much later I can't tell you.

Q Alexander Haig.

A I doubt it. I shouldn't say I doubt it. I have no recollection of Haig being discussed in this context.

Q Do you know for a fact whether, it was I believe, then Colonel Haig had access to the information in question.

[36] A Well, I know that Colonel Haig was Henry Kissinger's Deputy, I guess that was his title, on the National Security Council. And from my dealings with the National Security Council, I know that Colonel Haig had access to a great deal of information, documents and files. And I presumed, I would presume now that I knew then that he was, yes.

Q Hal Sonnenfeld? Helmut Sonnenfeld.

A I know Hall Sonnenfeld. I don't recall.

Q You don't recall whether he was one of the names?

A No, I don't recall whether he was one of the names.

(Pause)

Q The Cambodia bombing story which appeared in the New York Times, which Dr. Kissinger phoned Director Hoover about, appeared in the Times on Friday, May 9th. The various records of this period indicate that President Nixon and Dr. Kissinger were in Key Biscayne at that time, on that date.

Do you recall whether any of these conversations were at Key Biscayne or by telephone to Key Biscayne?

A I will tell you that I was at Key Biscayne during this period of time. My records show a meeting with the President and the Vice President and other people such as Rogers Morton and Harry Dent and Bryce Harlow. And my distinct recollection of them is it had to do with political affairs. And I recall [37] nothing that transpired at Key Biscayne on the weekend of May 9th and 10th that had anything to do with this, other than the fact that Mort Halperin says he met me down there.

Q The majority of the six or eight, were they NSC—well, let me ask it differently.

Did the six or eight, well, I guess I have not asked explicity, did it include Dr. Halperin?

A Yes.

Q In addition to Dr. Halperin, did it include other members of the NSC staff?

A It is my recollection that it did.

Q Did it include other persons who worked for the Department of Defense, including the Air Staff?

A I have no specific recollection.

Q You don't, for example, recall whether it included any Air Force officers who would have had operational contact with these reports.

A I do not recall any.

Q Do you recall whether it included any journalists?

A To the best of my recollection, it did not.

Q Anyone from the State Department?

A I know that there were people at the State Department, but whether they were included in this refined list or not, I [38] do not recall.

Q Who was aware of this refined list? The four people whom you've identified?

A To my knowledge, it would just be the President, Dr. Kissinger and myself.

Q Was that list ever reduced to writing?

A Not to my knowledge.

Q Did you have any conversation while you were at Key Biscayne concerning the—while you were at Key Biscayne, on that Friday, concerning the initiation of a wiretap on Dr. Halperin's home telephone?

A I have no recollection of any time while I was at Key Biscayne discussing the subject matter with anyone.

Q Excuse me, I want to go back just a second. As a result of these discussions, did the President give explicit instructions that a wiretap was to be placed on the home telephone of Morton Halperin?

A To the best of my recollection, no. Not in the specific terms of the individual.

Q Did he give such instructions with respect to the wiretap on any other individual in this period of time?

A Not as to a specific individual, to my recollection.

Q Did he give an instruction that a wiretap was to be [39] placed on the home telephones of the entire restricted group of six or eight?

A Not in the specifics of giving such a direction with respect to specific names.

Q I would now like to call your attention to a document dated May 12th, 1969, which we have in two versions; one of which will be Plaintiffs' Exhibit 1-A and 1-B. 1-A is the version which has been supplied to us in the case through discovery, with Dr. Halperin's name included, that with all of the information about other individuals taken out. And the second is the House Judiciary Committee's version of the same document, in which we have inserted in handwriting, they have initials, we have inserted in handwriting what we believe to be the names of the other persons which includes the information about the other individuals as well.

Have you seen these documents before, the originals?

A The originals?

Q Are you familiar with the document of which this is a copy?

A I am familiar—well let's back up. Am I familiar with the original of which one of these is a copy? Is that what your question is?

Q These documents, the two Xeroxes which I have handed [40] you—

A Uh-huh.

Q Both purport to be copies of the same document. They have different deletions.

A But your question was—

Q The question is are you familiar with the original of which these documents are a copy?

A I have no independent recollection of the original of the documents, of which these are copies.

I have seen, I believe it was this (Indicating) a copy of this same photostat, this same being the—you identify it as Exhibit A?

Q 1-A.

A And can add to it that to the best of my knowledge and belief this is a copy of my signature on this document.

Q By a copy of your signature, you mean it looks like it is a picture of an original of your signature, not somebody has copied your signature?

A I think that's right. I was referring to the document as a copy. The signature, I guess, is written.

MR. SLOCOMBE: For the record, 1-A is a memorandum for the Attorney General, dated May 12th 1969, with all but two paragraphs deleted on the first page and 1-B is the same memorandum [41] from the House Judiciary Committee evidence with the page number 192 at the bottom.

(The material referred to was marked Plaintiffs' Exhibits 1-A and 1-B for identification.)

BY MR. SLOCOMBE: (Resuming)

Q Do you have any recollection of the events on May 12th 1969 when this document was apparently signed?

A I do not.

Q Do you recall any discussion with Mr. Hoover with respect to this request for wiretaps?

A For wiretaps, yes, as I have previously testified. I had discussions.

Q For these specific four wiretaps?

A I have no independent recollection of these four or of the particular document discussions with Mr. Hoover.

Q Do you know whether, did you keep a telephone log of all of your telephone calls?

A Does that document still exist as far as you know?

Q Have you consulted that to know whether you had any telephone conversation with Mr. Hoover on May 12th of 1969?

A I have examined the log and it does not show any telephone calls with Mr. Hoover, nor does it show any individual [42] meeting.

[43] Q Does it include in that any telephone calls with any other senior FBI official?

Does it include in that specifically Mr. Sullivan, Mr. Tolson, and Mr. DeLoach?

A I would believe not. I have never talked with Mr. Tolson in my life. I did not deal with Mr. Sullivan. Whether it covers DeLoach or not I can't say. I'm inclined to say I believe it did not because I went through the log and took out these names and so forth; and I believe that I would have put DeLoach in there if I had had a conversation with him, because practically the only two people at the FBI that I talked to were Hoover and DeLoach.

Q Were you aware that in fact a wiretap had already been instituted on May 9 on Halperin's home telephone when this document reached you?

A I have no recollection of such knowledge.

Q Would it have been—I take it it would have been a substantial departure of usual procedures for a tap to have been on for three days when the authorization reached you?

A I think that would have been most unusual.

As far as I know, I do not recall any circumstances where that would have taken place.

Q You have now read Exhibit 1-B, which is the fuller [44] version of the two.

A Well, I've skipped through it.

Q How does that compare in terms of the discussion of the reasons for instituting—and I call your attention particularly to the paragraph which in the 1-B version begins, "N", which is the code for Dr. Halperin.

How does the description in that paragraph compare with the information that you customarily receive before approving a wiretap on an individual in connection with a regular national security wiretap procedure which you've described?

A It's somewhat briefer. But I go back to my prior testimony and state that it would depend on the substance of

the documents submitted to me as to what prior oral conversations had taken place on the subject matter.

Q I call your attention to the second sentence in the first paragraph which reads, "He," referring to Colonel Haig, "stressed that it is so sensitive it demands handling on a need-to-know basis, with no record maintained."

What did you understand by the phrase that there would be no record maintaned?

A That it would not be put into the customary files of the FBI.

[45] Q And how about in your office file, the file which you described as being in the anteroom of your own office?

A You mean, did this refer to it, refer to my files?

Q Well, I assume that the FBI doesn't have control over your files.

A That's correct.

I have no recollection of ever taking cognizance of this phrase in here.

Q Did you, as far as you know, cause the usual records to be made for your file with respect to these four wiretaps?

A I have no recollection one way or the other.

Q Do you have any knowledge of whether the files to which You refer still exist?

A I do not know specifically whether they still exist or not. Whatever the files were, were left in the Justice Department when I left.

Q So, as far as you know, if an examination of those files shows other national security wiretaps instituted in early 1969 are recorded in the normal way and there is no record of those wiretaps, no record was made at the time?

A Now I don't know that I can affirm or deny that.

I don't know who might have had access to them, or who might have removed them or otherwise. I just can't help [46] you, that's all.

Q Did you cause—who would have actually done the paperwork of creating that file in the normal course?

A During this period of time, Mrs. Susan Morrison—

I take that back. Oh, excuse me.

Let's see. This would be May of '69. I believe it would have been not Susan Morrison but Mrs. McKay; isn't that what Ramsey's secretary's name was?

MR. HUNDLEY: McHale.

THE WITNESS: McHale.

BY MR. SLOCOMBE: (Resuming)

Q And would you describe to your knowledge what she normally did?

A What paperwork did she create to indicate that the wiretap was in place?

A Whatever papers normally came into the office.

Q So, she would make a copy and put it in the file?

A Either that, or there would be copies attached.

Q There would be copies attached?

A Yeah.

Q You don't have any recollection of how this document reached you since you say you have no recollection of it at all?

[47] A I do not have a recollection of this specific document.

Q Normally, when a sensitive document is being delivered to you from the FBI, how would that be handled?

Who would bring it?

A I'm not certain I can answer that because I don't know. It was a long ways from that inner office out to that outer office.

Q But, for example, Mr. DeLoach, or Mr. Sullivan wouldn't come to you from time to time with sensitive documents and say I have a document, Mr. Attorney General?

A It might have happened once, twice, or three times the whole time I was there; but it had nothing to do with wiretaps.

Q When you would receive a document like this, did you feel that you had to make an independent decision taking into account the information that was available to you both in the document and from other conversations—that you had to make an independent decision on whether to approve the wiretaps?

A In some cases, yes, as I've previously testified, and in some cases no.

Q And if I remember correctly, the exception was when [48] the President had instructed you to approve a wiretap?

A That's correct.

Q With respect to this specific wiretap, did you understand that the President had instructed you to approve this wiretap?

A Yes.

Q Why did you reach this conclusion?

A Based on the conversations I had had with the President prior to the time it was submitted to me.

Q Even though, if I recall your testimony correctly, the President had not instructed that any particular individual was to be wiretapped?

A My testimony was, as I recall, that the President did not state that a wiretap was to go on Y's telephone.

Q But when you got a request to put a wiretap on Y's telephone, did you feel bound by the President's decision to put the tap on?

A I did.

Q And what I'm trying to get at is it's one thing if the President says I want done whatever is necessary to find out about these leaks, and even if he says he wants wiretaps used where appropriate, and another thing, if he says put a wiretap on Halperin.

[49] A So we don't waste all afternoon, I'll answer the right question for you, okay?

Q Okay.

A The taps were to be put on the individuals who had been discussed as transmitted to the FBI by Dr. Kissinger or his staff. That was the answer.

Q That is, your instructions from the President as you understood them was that Dr. Kissinger would provide names or a member of his staff would provide names for the FBI, and that when you received such a name you are under instructions from the President to put on such a tap?

A That is correct.

(Pause.)

Q Did you from time to time receive notifications of—well, just to get the record clear, I take it from time to time you received additional similar requests for wiretaps in the same series?

A That is correct.

Q Did you from time to time receive notifications that those wiretaps had been discontinued?

A My recollection is yes.

Q Did you ever have any discussion with Mr. Hoover or other senior FBI officials with regard to the usefulness of the [50] taps which were still being continued?

A To my recollection I had no such discussions.

Q Is your answer limited to FBI officials, or no such discussions with anybody?

A I have no recollection of having such discussions with anybody.

Q In your discussion with the President and Mr. Hoover and Dr. Kissinger in April and May of 1969 when this program began, was there any discussion that these taps were to be exempt from the usual renewal procedure?

A I recall no such discussion.

Q Was it your understanding—what was your understanding about how long the taps were to remain on once approved?

A I don't think I'd ever considered the subject matter.

Q Was it your view that they had to remain on until Dr. Kissinger or someone on his staff instructed they be taken off?

A I have no view of it, and I don't think I ever considered it.

Q So, I take it, that in fact, no 90 day renewal requests were ever made to you with respect to Dr. Halperin's tap?

A To my knowledge, there were not.

(Pause.)

[51] MR. SLOCOMBE: Just a moment.

Maybe we can cut some of this short. (Discussion off the record.)

BY MR. SLOCOMBE: (Resuming)

Q Mr. Mitchell, did you from time to time receive in connection with this program reports?

Well, did you have any understanding as to how the fruits of this wiretap were to be conveyed to the White House?

A How they were to be conveyed?

Q That's right, to Dr. Kissinger and the President.

A How?

You mean by messenger, or form, or content, or what?

Q Well, was it your understanding that summaries would be prepared from time to time and sent forward by letter from Director Hoover, or would someone come and read them? Were the logs to be sent over?

How were the people at the White House to find out what was happening with the taps, if you know?

A I have no independent recollection other than the fact that the information was to be made available to Dr. Kissinger in his office.

Q In Dr. Kissinger's office?

A Dr. Kissinger and his office.

[52] Q. I'm sorry.

Did you, from time to time, receive reports from Director Hoover of the content of the overheard conversations?

A I have no independent recollection of it. But, since this matter has started, I have reviewed some of the exhibits or documents in here, and I have noticed that there were summaries forwarded to me on two or three occasions, I'm not sure which.

(Pause.)

Q Was there any discussion in connection with the understanding that the information provided to Dr. Kissinger and his office, as to what Dr. Kissinger would do with the information once he received it?

A I have no recollection of any such understanding.

Q Was it contemplated that he would take action against the people whom he decided were responsible for the leaks, if he were to decide that anybody was responsible for the leaks as a result of these wiretaps?

A If I can answer your question in this way, I do have a recollection of the President saying that if it was established as to who was providing this information constituting the leaks, that they would be summarily removed from their positions in the government.

[53] Does that respond to your question?

Q That's the only understanding you have of how the information would be used?

A That's correct.

Q Was there any discussion that they would be prosecuted?

A To my recollection the matter was not discussed.

Q I'd like to show you a cover, what appear to be a cover memorandum, a carbon of a cover memorandum from Director Hoover, which will be Plaintiffs' Exhibit 2.

(The document referred to was marked Plaintiffs' Exhibit No. 2 for identification.)

BY MR. SLOCOMBE: (Resuming)

Q And that's dated August 6, 1969.

Do you recall receiving that memorandum?

A I do not.

I might add that if the Attorney General read everything that he got by way of information that came in to his office, he could go for 24 hours a day. It would take all of his time.

Q This is—we have not been given a copy of the attachment. We have been given a copy of the letter to the President and Dr. Kissinger, which is referred to in the parenthesis at the bottom of the memorandum, and this [54] will be Plaintiffs' Exhibit 3. Is the part of that letter to the President which relates to Dr. Halperin—it begins—one page is deleted. Page 1 to 9 is deleted, and the first page with text on it is page 10, which begins, "Morton H. Halperin. During a conversation with an unidentified woman, Dr. Halperin's wife, said . . ." To clarify the record, this is not actually the letter to the President. This is an excerpt from a memorandum which was attached to the letter to the President, which appears to be the same letter that was attached to the memorandum to you.

Do you recall ever seeing that before, except perhaps in preparation for this deposition?

A No, I do not.

Q Do you have any idea why this information would not have been sent to you?

A No, I do not.

(The document referred to was marked Plaintiffs' Exhibit No. 3 for identification.)

BY MR. SLOCOMBE: (Resuming)

Q You have no recollection of receiving this?

A I have no recollection of receiving this.

Q Who would have read material of this character [55] before it reached you and perhaps to decide whether it should be given to you actually to read?

Who screened information for you?

A My secretary.

Q Who was it this time in August of '69?

A It would either be Mrs. McHale or Mrs. Morrison. I'm not quite sure when the switch took place.

Q And do you know what your secretary did with information which she decided, although addressed to you, you ought not to be bothered with, ought to go to somebody else?

A It would depend entirely upon the classification of it. Do we know whether this is classified or not?

Q My belief is that the deletions at the top and bottom are deletions of some security classification, probably Top Secret.

A Well, if it were so classified, it would go into that safe in the Attorney General's anteroom.

Q And you never caused any documents to be removed from that safe?

A I did not.

Excuse me. Excuse me.

Let me correct that.

When I left office, that safe, which was about five [56] tiers high (Indicating) contained a great deal of material from the National Security Council and I believe the Central Intelligence Agency not relating to these materials, but to other materials; and I had people from the National Security Council and from the Central Intelligence Agency come down and check that back out. The Department materials were left there; but talking about materials related to my function on the National Security Council and other agencies of government—

Q Do you know who the person on the National Security Council who performed that function was?

A I believe it was General Haig.

If it was not General Haig, I do not know who it was.

Q In connection with this function of taking out documents relating to your functions on the National Security Council, would General Haig have had access to all of the drawers?

Is this a drawer safe?

A It's a drawer safe.

Q He would have had access to all of the drawers?

A I do not believe that he would have, because it's my recollection that my secretary at the time was with the individual. The materials relating to the Department of Justice matters, such as wiretap investigations, the other matters, were below that; [57] and I believe he had access only to the lower drawers.

Q But the drawers would have been unlocked at the time they were doing it?

A I am not certain. It was such a complicated instrument put in by the CIA that I can't tell you how it operated.

Q Did you ever give any instructions for physical surveillance on Morton Halperin?

A No.

Q Was your approval normally required for a physical surveillance?

A No.

Q Did you ever give any instructions for a physical surveillance on Henry Brandon?

A. Off the record.

(Discussion off the record.)

THE WITNESS: No, I didn't.

BY MR. SLOCOMBE: (Resuming)

Q Do you know whether any such surveillance was ever instituted on Morton Halperin?

A No, I do not.

Q On Henry Brandon?

A I do not.

[58] Excuse me. Other than the fact that I saw some pictures in your—

Q Yeah. We all are aware of those.

I'd like to show you a memorandum from Director Hoover to the Attorney General dated September 15, 1969, which will be Plaintiffs' Exhibit 4.

(The document referred to was marked Plaintiffs' Exhibit No. 4 for identification.)

BY MR. SLOCOMBE: (Resuming)

Q It begins, "Reference is made to prior correspondence." Do you remember receiving this document?

A I do not.

Q The second paragraph says, does it not, "According to Colonel Alexander Haig, Dr. Kissinger has now advised that he desires all such surveillances installed at his request discontinued except the ones with reference to Morton Halperin and " name deleted. "Accordingly the surveillance on," apparently two names, "are being discontinued today."

Does the description in that paragraph of who controlled the continuance of these wiretaps correspond to your understanding at the time—that is, that it was up to Dr. Kissinger to decide when the wiretaps came off?

[59] A I think I would have to answer the question the way you put it yes.

Dr. Kissinger, having initiated the taps, that it would be his determination as to when they came off. Yes.

Q You do not recall any discussion with Dr. Kissinger or Mr. Hoover concerning the Halperin and the other tap?

A I do not.

Q Did the receipt from time to time of these discontinuation memos cause you to have any thoughts with respect to the regular 90 day requirement in normal national security taps?

A I can't recall whether I ever received them.

I have no recollection of ever considering the matter in the way you put it.

(Pause.)

Q Now, I show you a memorandum dated December 29, 1969, from Mr. Sullivan of the FBI to Mr. DeLoach, which forwards certain letters to the President to be signed, to be sent to the President; and bears a handwritten notation which Mr. DeLoach has identified as his handwriting. It says, "Suggest AG also be advised."

Do you have any idea why—well, just to make the documentation complete, a memorandum from the Director of the FBI to the Attorney General dated December 29, 1969, and this again [60] is a carbon which will be Plaintiffs' Exhibit—the memorandum from Sullivan to DeLoach—will be 5, and the memorandum from Hoover to the Attorney General will be 6.

(The documents referred to were marked Plaintiffs' Exhibits No. 5 and 6 for identification.)

BY MR. SLOCOMBE: (Resuming)

Q There are two, the one that has Attorney General at the top is 6, and the one that has DeLoach at the top is 5.

After you have had a chance to look at them, could you tell me whether you recall receiving them?

A No, I do not.

Q Do you have any idea why Mr. DeLoach would have suggested this material be transmitted to you?

A No, I cannot help you with Mr. DeLoach's mental processes.

Q Did you ever have any conversation with Mr. DeLoach about him sending you material which he thought you might be interested in?

A Sending him?

Q His recommending to Mr. Hoover sending material he thought you might be interested in?

A I recall no such conversations.

[61] Q Do you recall any conversations with Mr. DeLoach about this program?

A I do not recall any; but I certainly cannot exclude them, except insofar as I have previously testified that my records covering this conversation do not show any telephone calls with Mr. DeLoach.

Q Now, this was in December of 1969.

A I am not certain.

Q Does your survey go that far?

A No.

You're probably correct.

I did not check into that area.

My survey went from April through the end of May.

Q I'd like to ask you a question about the content of the December 29, 1969 memorandum?

A To?

Q To you?

A Yes, sir.

Q Do you consider this information which relates to leaks from the National Security Council?

Perhaps for the record you could just briefly summarize what the memorandum is all about.

MR. CHRISTENBURY: Mr. Slocombe, I'm not sure I [62] understand the relevancy at this point.

Mr. Mitchell has testified he never saw this document therefore he never made any assessment at the time.

What you're asking, in effect, is some six years later, without benefit of all the facts which may or may not have surrounded this document, for Mr. Mitchell to draw a conclusion some five years removed.

I'm not sure that's either fair or appropriate to the witness in this regard.

THE WITNESS: Well, now you'll ruin my chances for a fee as an expert witness.

(General laughter.)

MR. SLOCOMBE: Was that just an observation?

MR. CHRISTENBURY: Well, I would interpose an objection.

Of course, we cannot instruct the witness not to answer, but we would interpose an objection as to the way the question is framed.

MR. HUNDLEY: Wait till we assess it.

(Pause)

THE WITNESS: What was the question.

BY MR. SLOCOMBE: (Resuming)

Q The question is whether your assessment of that document is that it relates to leaks from the National Security [63] Council?

A I don't believe, based on a reading of this document at this time that I have enough information to make that assessment.

Q Do you know who Clark Clifford is?

A Having played golf with him, I think I do.

Q Was it a concern of the Administration at this time to be aware of criticisms of the Vietnam policy of the Administration?

A It wasn't a concern of mine as a member of the Administration. Whether it was a concern of other parts of the Administration, I think you'll have to ask them.

Q Who would you suggest we ask—and I mean that quite seriously?

Who would the people who in your judgment who were responsible for answer criticisms of the Vietnam policy?

A Those who were conducting the foreign policy.

Q Which would be?

A The President; Dr. Kissinger; the Secretary of State; the Secretary of Defense.

Q Was it your understanding that Mr. Haldeman had any responsibilities in that area?

A I've never known Mr. Haldeman to have any [64] responsibilities in any area that had anything to do with substance.

Q Mr. Ehrlichman?

A Mr. Ehrlichman did not have anything to do with any areas that had anything to do with foreign policy.

Q Did Mr. Haldeman have anything to do with matters dealing with domestic politics?

A Yes.

Q And Mr. Ehrlichman?

A Not during this period of time. No, other than domestic matters were concerned that might affect politics.

Q You never had any discussion, I take it, with Mr. Haldeman or Mr. Ehrlichman or anybody on their staff about responding to Mr. Clifford's criticism about White House plans to make a response to this?

A. I have no recollection of it, no.

Q The next document is May 4, 1970, which is another, I think we're up to 7.

This is Plaintiffs' Exhibit 7, which is another carbon of a memorandum from the Director of the FBI to you.

(The document referred to was marked Plaintiffs' Exhibit No. 7 for identification.)

[65] (Pause.)

BY MR. SLOCOMBE: (Resuming)

Q Do you have any recollection of receiving this document?

A I do not.

Q At the time of the Cambodian invasion, did you participate in any discussion concerning leaks from the government?

(Pause.)

A I don't recall any.

I have no recollection.

Q Do you have any idea why this document would have been sent to you?

A No, I do not.

Was it sent by Hoover?

Q Yeah.

A Other than the fact that my name was mentioned.

Q Do you regard the collection of this kind of information as consistent with your understanding of your understanding of the original purpose of the wiretap?

A I would have to give you the same answer I did to a similar question before, that without a more detailed study of this, and without more information concerning some of the contents, I cannot answer that.

(Pause.)

[66] Q Did you participate in any discussion of the change in the procedure which took place at around this period of time—apparently around May 12, 1970—of a change in the procedure for delivering the summary letter, so that instead of going to the President and Dr. Kissinger, they would go to Mr. Haldeman?

A To my recollection, I did not.

Q Were you aware of that change being made?

A To my recollection, I was not.

Q Our information indicates that this one in May was the last of the summaries to have been sent to you.

I take it you have no recollection of receiving one subsequent to the Cambodian invasion?

A I have no recollection of receiving these; so I have no recollection of receiving ones subsequent to the Cambodian invasion. No.

Q Okay.

Did you have a conversation with Dr. Kissinger or General Haig in which you or they referred to these wiretaps as a dangerous game?

A I do not recall such a conversation in that context. In fact, it was quite to the contrary.

(Pause.)

[67] Q Do you recall being interviewed about this matter by two FBI special agents in May of 1973?

A I recall being interviewed by a couple of them in '73. I'm not sure whether it was May or not.

Q Their report of your conversation says, "To the best of Mitchell's recollection he did sometime thereafter discuss these wiretaps with either Colonel Haig or Dr. Kissinger at the White House, and they—Mitchell and Haig and/or Kissinger—agreed that these wiretaps could become 'explosive' and that this whole operation was a dangerous game we were playing."

"Mitchell stated, however, that to the best of his recollection, nothing was done as a result of his informal discussions mentioned above at the White House."

Does that refresh your recollection—not as to what you said to the FBI agents, but as to whether the event took place?

A I would like to look at that.

Q I would be glad to let you look at that for verification.

A I have read that interview recently, and the interview has two infirmities. Number one is that our conversations were not accurately reported; and number two, with regard to some of the other substance of what you're talking about, this is subject matter that they asked me about fresh off the top of their heads and my head some four or five years after the event. So, my recollection was not refreshed.

Now, to get back to your specific question, I do not [68] recall having such a conversation with Haig or Kissinger on the subject to which you make reference, of the "dangerous games".

Q Do you recall saying it to the FBI agents?

A No, I do not.

Q On February 11, 1971, you received or a memorandum was addressed to you, which will be Plaintiffs' Exhibit 8, which says in effect that the wiretap had been discontinued.

(The document referred to was marked Plaintiff's Exhibit No. 8 for identification.)

THE WITNESS: Is that a question?

BY MR. SLOCOMBE: (Resuming)

Q Do you recall receiving that memorandum?

A I do not.

Q Did you have any discussion with anyone about this final termination of these taps?

A Not to my recollection, I did not. And, if I could supplement my former answer, this is the type of thing the secretary would just take and file and probably never call to my attention because it was terminated.

Q Do you know whether Mr. Hoover had a practice of terminating all the wiretaps he could terminate just before he [69] was to testify on the FBI appropriations so he could report a reduced number of surveillances in effect?

A I have no specific knowledge on the subject matter. I have heard rumors to that effect. Whether they are valid or not, I wouldn't know.

Q In June and July of 1971, did you participate in the investigation and the monitoring of the investigation of the publication of the so-called Pentagon Papers.

A Investigation and monitoring of the publication of the Pentagon Papers?

MR. HUNDLEY: We don't quite understand that.

MR. SLOCOMBE: Well, if it's the monitoring that's bothering you, that I will be glad to rephrase.

Shall we take a short break, now?

MR. HUNDLEY: Yeah. I'd like to ask him about this.

(A brief recess was taken.)

BY MR. SLOCOMBE: (Resuming)

Q I think the pending question is whether as Attorney General you participated in any way in the investigation of the Pentagon Papers case?

A Well, not in the investigation; but the consideration of it, yes.

Q That's what I was trying to get at by monitoring the [70] investigation.

Did the name Morton Halperin come up in any connection with your consideration of that case?

A I have no recollection of it, no.

Q Was there any discussion of the possibility that Dan Ellsberg had not acted entirely alone?

A Yes, I'm sure there was. But—

Q Can you recall the names of any individuals who it was thought might have been involved with him?

MR. HUNDLEY: Well, I'm going to object, unless the question is whether or not there was any discussion of whether or not he acted with the Plaintiff in this lawsuit; because otherwise we're going to get into an area, and God, we'll be here—

MR. SLOCOMBE: I'll accept that.

BY MR. SLOCOMBE: (Resuming)

Q Was there any discussion in any way of a possible role of Dr. Halperin, either consciously or unconsciously, in the publication of the Pentagon Papers?

A Not to the recollection I have of those discussions.

Q I'd like to show you a memorandum dated June 15, 1971, which says Re Morton Halperin, and this is Plaintiffs' 9; and though it says it's continued on the second page, [71] this is the only one we've ever found—and ask you whether you have ever seen this memorandum?

(The document referred to was marked Plaintiffs' Exhibit No. 9 for identification.)

THE WITNESS: I have no recollection of ever having seen this document.

BY MR. SLOCOME: (Resuming)

Q From its format, are you able to suggest who might have prepared it?

A No, I am not.

Q Mr. Ehrlichman in making notes of conversations in which he, Mr. Haldeman, and the President participated about the Ellsberg case and the Pentagon Papers affair generally made a note which reads, "Re Grand Jury, don't worry Re Taps on discovery Re White House."

Does that mean anything to you?

A Would you read that more slowly?

Q Yeah.

I'll give you a copy.

This will be Plaintiffs' 10.

A And what would the page before it be?

Q Well, the page before indicates that it would be a [72] conversation that took place on July 10, 1971, and this is page 141 of a House Judiciary Committee document.)

(The document referred to was marked Plaintiffs' Exhibit No. 10 for identification.)

MR. BRESS: What book number, do you know?

DR. HALPERIN: Seven.

MR. BRESS: Seven?

THE WITNESS: Have you figured out what that last WTTS is?

BY MR. SLOCOMBE: (Resuming)

Q Well, it could be WTTS, but I think it's WHS or it could be WTTO.

DR. HALPERIN: Well, it's wiretapping.

BY MR. SLOCOMBE: (Resuming)

Q Well, it could be wiretapping. We'll be taking Mr. Ehrlichman's deposition shortly, and he may be an expert on his own handwriting.

A And your question was?

Q Does it convey anything to you about the relationship between wiretaps and the Pentagon Papers investigation?

A Nothing whatsoever.

Q Was there any discussion to your knowledge of the [73] problems that might be posed if subjects of these wiretaps, people who were overheard on their telephone, were summoned before a Grand Jury?

A I recall no such discussion at the time of the Ellsberg matter or at any other time.

Q Do you recall whether there was any discussion of whether or not, in fact, Ellsberg had been overheard on any of these wiretaps?

A I do not recall any such discussion.

Q I'd like to turn now to the removal of these documents, the FBI's set of these documents, from the FBI.

Do you recall any conversation with Mr. Mardian concerning the disposition of these documents? By these documents I mean the FBI's files relating to these wiretaps?

A I recall Bob Mardian telling me, and it was I believe—this is to the best of my recollection—after my return from Europe, that the documents had been transferred from the custody of, I assume it was Sullivan, to the White House.

Q Just to fix the time, when was the trip to Europe to which you referred?

A I left Washington, D.C. on the seventh of July, and returned on the 26th day of July.

Q So, it would have been in late July or early August [74] of 1971?

A That would be the best of my recollection.

Q Do you recall a telephone conversation with Mr. Hoover in October of 1971 about this matter?

A I recall discussing it with Mr. Hoover. I don't know whether it was a telephone conversation or a meeting I had with him.

Q To go back to the conversation with Mardian, did he tell you why Sullivan had wanted to remove the documents from the FBI files?

A Yes, he did.

Q Will you tell me the substance of that conversation?

A The substance of it was that he, Sullivan, who was then in a large hassle with Mr. Hoover—I'm not sure whether he had been fired by then or not—had advised Mardian that he, Sullivan, was concerned that Mr. Hoover would use his knowledge of these taps in an untoward manner in connection with the Administration. I can't be any more specific than that.

Q Did you share that concern?

A I had no concern about it one way or the other, which is evidenced by the fact that I never did anything about it.

Q And did Mr. Mardian indicate to you why he had taken the documents to the White House?

[75] A My recollection is that Mr. Mardian told me he took the documents to the White House to check the documents that the FBI had against the documents that were in the White House to see if they were all there and all corresponded.

Q To your knowledge, was any effort ever made by the FBI to retrieve from your office any documents such as, for example, the three memoranda which were sent to you relating to this?

A Not to my knowledge, no.

Q Did you ever give any orders to Mr. Mardian not to discuss his removal of the documents to anyone?

A I have no recollection of it.

Q He apparently told people in the FBI in October of 1971 that you gave such instructions.

A All I'm saying is I have no recollection of any such conversations.

Q Okay.

Do you recall any correspondence with Mr. Hoover with respect to this removal?

A No, I do not.

Q Did you ever tell Mr. Hoover, to go back to this conversation or exchange on the telephone or in person with

Mr. Hoover, about the removal of the documents?

[76] Will you state for us the jist of that conversation?

A To the best of my recollection it was that Mr. Hoover made enquiry concerning, not so much enquiry, but a statement about what had transpired between Sullivan and Mardian and asked me if I was aware of it; and I told him that I was. He asked me where the documents were, and I said to the best of my knowledge they were at the White House.

Q And by saying he made a statement of what had transpired, he made a statement that Sullivan had given them to Mardian?

A Yeah.

The Sullivan-Mardian transaction. He may have injected other names into it, but I have no recollection of it at this time.

Q Your recollection of it is that you did not say to Mr. Hoover that the documents had been destroyed?

A Absolutely not.

(Pause.)

Q To go back to the general procedure for national security wiretaps, did you form any conclusion as to the legality of the procedure which was employed for national security wiretaps?

A My answer would be that based on the prevailing practice [77] that had existed in the Justice Department for a long period of years and the language contained in the Safe Streets Act, I had formed the opinion that it was proper to proceed with the procedure as it existed in the Department.

[78] Q Did you cause any analyses to be made of the impact of recent decisions by the Supreme Court on past practices with respect to National Security Council wiretaps?

MR. CHRISTENBURY: Mr. Slocombe, just for my edification, if you can indicate what time period you're re-

ferring to, and what Supreme Court decision you have in mind?

MR. SLOCOMBE: I have in mind the time period of early 1969. And, specifically, the Alderman case and the Katz case.

THE WITNESS: Oh, yes.

BY MR. SLOCOMBE: (Resuming)

Q Did you cause any memorandum to be prepared, or do you know of any memorandum that was prepared concerning the impact of the Alderman case on the prior procedures of the Justice Department with respect to national security wiretaps?

A The only recollection I have is that I have no recollection with respect to memoranda, whether the Department at a lower level prepared them or not, I do not know.

I remember having discussion within the Department with the Solicitor's Office, and I believe the Criminal Division, on the subject matter. And I have a recollection the determination was the subject matters had not been covered by those cases in any manners that would affect the procedures [79] we were following with respect to national security taps.

Q You've referred a couple of times to the logs of your—I guess of meetings which you held, and telephone conversations?

A Yes. While I was in the Justice Department, there was a log kept of every meeting that I had, and every telephone call that was completed. And I think that it is as accurate as it can be, because of the fact there were so many girls out there in the Attorney General's office that when one was out the other one kept it.

Q Do you know who now has custody of those documents?

A Well, they go from '69 all the way through March of '72, and—do we have copy of those?

MR. HUNDLEY: The FBI has the originals.

THE WITNESS: The FBI has the originals of all of them? I don't think so. Not of all of them.

MR. HUNDLEY: Well—

THE WITNESS: Well, I think I may have some of them. Others are in the possession of the FBI.

MR. HUNDLEY: And the Special Prosecutor.

THE WITNESS: And the Special Prosecutor.

BY MR. SLOCOMBE: (Resuming)

Q Do you have a copy of the complete set?

[80] A I think so. I think so. There were an—but I'm not sure. There were an average of two for each year, so you're talking about seven or eight logs.

MR. HUNDLEY: Do you have '69?

THE WITNESS: I think so.

MR. HUNDLEY: Well, if we don't have a complete set, we can get it.

MR. SLOCOMBE: Well, without prejudice as to whether or not these were covered—and I think they were covered by a previous Rule 34 request—we would like access to those logs for the period of, let's say, April 15th to May 15th, 1969.

MR. HUNDLEY: All right, I'll make them available to you.

THE WITNESS: I think I have that volume up in New York, if I'm not mistaken. We'll get it down here as soon as we can.

MR. SLOCOMBE: And also for the period around the time of the Clifford letter. That would be, say, from December 25th, '69, to January 20th or so, 1970.

MR. HUNDLEY: All right.

THE WITNESS: April through May of '69; and June and July of '70?

MR. SLOCOMBE: No, late December '69, through, say, [81] January 20th of 1970.

BY MR. SLOCOMBE (Resuming)

Q I want to be sure I understand your answer with respect to the assessment of the Justice Department as to

the legality of national security wiretaps subsequent to the Supreme Court decisions in Alderman and Katz.

Were there to your knowledge memoranda prepared in the Department concerning the impact of the whole series of cases prior to, up to any including Alderman, both as to procedure any as to whether such taps remained legal?

A I have no recollection of whether or not there were memorandum prepared in the Department. I do have the recollection of the discussions we had, as I have testified to you previously.

MR. CHRISTENBURY: Excuse me, Mr. Slocombe, to help me in this matter—I can't recall the date of Katz. Was it—was it '67?

MR. SLOCOMBE: Yeah.

MR. CHRISTENBURY: So the record should reflect that the Katz decision came down before Mr. Mitchell became Attorney General.

MR. SLOCOMBE: The Alderman decision, if I recall, came down on the day you became Attorney General.

THE WITNESS: Well, it was close to it.

[82] BY MR. SLOCOMBE: (Resuming)

Q Was there any discussion in the Department of the legality of ordering these wiretaps, in general, in the light of these decisions?

A This is what I had reference to.

Q Well, I just want to be clear that it's national security taps, not national security taps without a warrant.

A Well, you're familiar with the fact that all national security taps from the Justice Department are warrantless. So when we are discussing the subject matter, they are one and the same.

MR. SLOCOMBE: That's all I have. Thank you.

MR. CHRISTENBURY: Could we take just a short break?

MR. SLOCOMBE: Sure.

(A brief recess was taken.)

EXAMINATION BY COUNSEL FOR FEDERAL DEFENDANTS

BY MR. CHRISTENBURY:

Q Mr. Mitchell, I just have a couple of brief questions.

As I recall, you described the meetings you had in late April and early May, that the purpose for which these surveillances were initiated was to try to determine the source or sources of leaks of classified information.

During those meetings, was there ever any discussion [83] or ever any suggestions that these surveillances were placed on for any other purpose? Particularly, to obtain political information with regard to the subjects?

A No, sir.

Q Mr. Mitchell, also in setting forth your understanding of your instructions from the President with regard to authorizing these electronic surveillances, as I recall you indicated that your instructions were those names which Dr. Kissinger's staff brought to you for surveillances to be authorized. This was your instructions from the President.

My question goes to this area. If, during your meetings in late April and early May, if Director Hoover had suggested a name of a person to be the subject of electronic surveillance and subsequently Dr. Kissinger's staff brought that name over to the FBI and it was subsequently brought to you, would you feel that you were under instructions from the President to authorize that surveillance, also?

A Well, I don't know how to answer this. It's a hypothetical question. Now I don't know whether the facts that you relate took place, to my knowledge. And, regardless of how the information got to Dr. Kissinger and what his assessment was, if it were an individual that Dr. Kissinger advised me of, and advised the Bureau, that would fall within my [84] understanding of the President's directions.

Q I see.

And, lastly, Mr. Mitchell, is it and was it your good faith believe that all of those actions were lawful?

A It was my personal and legal opinion that they were lawful and that legal opinion was butressed by the consultations I had had with the staff in the Justice Department.

MR. CHRISTENBURY: Thank you. I have no further questions.

MR. MC GIFFERT: No questions.

MR. BRESS: No questions.

MR. SLOCOMBE: I have, I think, about four questions.

FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. SLOCOMBE:

Q If I understand your answer to Mr. Christenbury's long question, there was, in fact, no instance in which Mr. Hoover recommended a name to Dr. Kissinger and then Dr. Kissinger asked Hoover to put the tap on?

A That's correct.

Q Who on the staff of the Justice Department was it with whom you had these consultations?

A I testified here just a few minutes ago that it was either the Solicitor or representatives of his office; and [85] representatives of the Criminal Division.

Q The Solicitor General at that time was Dean Griswold?

A Dean Griswold.

Q All right, can you identify the individuals in the Criminal Division?

A No, I cannot. I had so many meetings on so many subjects with them that I cannot.

Q Did you give any instructions in connection with this wiretap of Dr. Halperin, or the set of wiretaps, to avoid the recording and interception of conversations relating to domestic party politics?

A I gave no such instructions.

Q Relating to dissent from the policies of the Administration?

A I gave no such instructions.

Q Relating to the private lives of the individuals concerned?

A I gave no such instructions. That was a standard practice on the part of the FBI, as I understood it.

Q What was a "standard practice"?

A To eliminate, in their overhearings, and their reports, any materials that had to do with people in their personal or private lives.

[86] Q Did you give any instructions that the conversations of third-parties who were using the telephone—for example, house guests—ought not to be intercepted?

A I recall none such.

Q Is it your judgment that the FBI, in fact, followed the policy that you described? That is, of eliminating from their reports information about the private lives of the people for who they were monitoring?

A That is my understanding, that they not only do that, but they also eliminate matters that they deem to be immaterial and I'm talking about in preparing their logs or memorandum that are used.

Q On what do you base that understanding?

A Discussions I've had over a period of years while I was in the Department.

Q With whom?

A People in the Criminal Division and the FBI.

Q Can you identify the individuals?

A Well, I'm sure Director Hoover would be one. Probably Deak DeLoach. People in the Criminal Division. It could be any one of them in the line of the chain of command when we were discussing these subjects of wiretapping.

Q Did you ever have occasion to review the logs of [87] FBI taps to see whether this policy was, in fact, being carried out?

A I never reviewed their logs, for that particular purpose. On the limited occasions when I would see the "logs" from the taps, I have never to my recollection seen anything in there that had anything else to do with other than the subject matter for which the tap had been put on.

Q So that your judgment would be that if, in fact, a log reflected information about strictly personal matters, that that was the FBI's understanding that they were supposed to collect the information in that particular case?

A Not necessarily. It might have been for that reason, or any other reason. I can't guestimate as to what the understanding of the FBI might be.

Q I'm puzzled—

A I'm puzzled by your question, and you're puzzled by my answer.

Q Well, the deposition we took from FBI officials who were in charge of the actual monitoring indicated the policy was different from what you indicated. And that's why I'm pursuing the question.

A Well I can only respond to that by saying that's not my understanding. I'm not only talking about this area—this [88] was not singled out for any special consideration. I'm talking about the general practice that I understood existed.

If I can supplement that answer, I want to make sure we understand that when we talk about logs, as I understand it, that is what is typed up and submitted to whoever is to receive that information.

I'm not saying what might not appear on the tapes, that they don't turn on or turn off.

Q I think we have the same understanding of the word "logs".

In your consideration of the legality of wiretaps, did you consider at any point that the legality of a tap might depend on the scope of what was intercepted? That is, whether an effort was made to restrict the conversations that were logged, to the extent that you've just described, to subjects relevant to the subject of inquiry?

A Are you talking in general, again?

Q Yes.

A Well there are regulations in the Department that cover this subject matter with respect to different kinds of taps.

Q Were there such regulations in effect for national security taps?

[89] A No, they did not apply to them, except—well, I'm not sure whether they did or didn't. I'm not quite certain. But you were talking about the general approach to them, and I'm saying that there were regulations that did limit the overhearings. I just didn't want to let that get by without that being understood.

Now, with respect to national security wiretaps, I'm not certain how they're affected by those regulations.

Q Well, apart from the fact of how they're affected by the FBI, or the Justice Department Regulations, you said you formed a personal and legal opinion, as Attorney General of the United States?

A That's correct.

Q Did you conclude that the legality of a national security wiretap depended to any extent on whether it was limited to information relevant to the inquiry for which it was instituted?

A Are you talking about the receipt of the information? Or the dissemination of the information?

Q Well, I would assume once you put a tap on, you can't avoid having at least one person hear everything that goes on on the line.

A Except in certain taps, when certain subject matters are discussed the tap is to be turned off under regulations [90] of the Department.

Now, with respect—excuse me. Go ahead.

Q Was it your conclusion that with respect to national security taps, the legality in any way turned on whether, for example, as you suggest, when certain types of subjects were discussed, or certain types of conversations,

the machines be turned off and the guy turn off his listening device?

A My opinion, as far as legality is concerned, is that it has nothing to do with respect to what is overheard.

Q And, with respect to the preparation of the logs, would you reach the same conclusions, that what was put in the logs had no impact on the legality of a conversation? The legality of the interception?

A I would believe it would have—it would be my opinion it would have no impact at all on the legality of the establishment of the overhearing, the wiretap, the electronic surveillance.

Q And would the continuation of a wiretap, without—would the legality of the wiretap in any way depend on how long it was continued?

A In my opinion, no.

Q That is, that the need for justification of a wiretap would not, so to speak, increase as it went on for longer and [91] longer?

A I don't think you could answer that as a blanket question. I think you would have to take each individual case, as I've testified to before.

Q Taking each individual—was it your understanding of the law that taking each individual case, a relevant question in assessing the continued legality of a wiretap was whether it was being productive?

A That is not the sole criterion, no.

Q But is it your understanding that it is a factor?

A It could be a factor, in some instances.

Q And would it be a factor in instances such as these?

A I can't answer that. I'd have to go back and review all of the logs and tapes and circumstances, to advise you. That's why I say that you cannot, as a blanket matter, answer that question.

Q Was the likelihood that information relevant to the purpose for which the wiretap had been instituted relevant to its legality? Was the chance that you would learn some-

thing which related to the stated reason for putting the tap on relevant to the legality of the wiretap?

A No.

Q So, if I understand it correctly, the sole basis for [92] the legality of the wiretap was a justification memorandum which supplemented by unrecorded, possibly unrecorded, oral conversations between you and other persons led you to sign the authorization and that provided you signed an authorization the wiretap was legal?

A No. I will review my testimony again for you.

The authorization is based upon the material contained in the authorization. That speaks for itself. The oral discussions that were had concerning the subject of the wiretap, all of the circumstances and surrounding matters that we have discussed that relate to it, plus a determination made in good faith by the people in authority that it was proper to place that tap on the individual involved for the purpose of protecting the national security of the United States.

Q Okay. Once that determination was made, did anything subsequent have to happen for the wiretap to continue to be legal?

A I think I've answered that question before and I'll answer it again. It would depend on the individual tap, the entity under the tap and all of the circumstances surrounding it, plus the product of the tap.

Q If it depended on the circumstances of the individual tap, would that not require some review of the circumstances [93] of that tap from time to time?

MR. HUNDLEY: Well—

THE WITNESS: I think that's a non sequitur, or at least I didn't understand your premise upon which that—

MR. SLOCOMBE: Let me rephrase the question.

BY MR. SLOCOMBE: (Resuming)

Q If I understand your testimony your judgment of whether it was proper to continue a tap would depend on the circumstances of the particular tap?

A And all of the other circumstances we've talked about in connection with the installation of the tap.

Q Yes, I understand that. Does that not imply the need for some procedure from time to time to review the circumstances of the particular tap?

A It depends entirely upon the nature of the tap and all of the other circumstances surrounding it. I testified before here earlier that as a matter of practice where there are certain entities under electronic surveillance that there's a determination that there's no need for an interim review of the product of the tap.

Q In your judgment, would that include retired government officials who were suspected at one time of leaking to individuals?

[94] A It would depend entirely upon the individual involved and all of the surrounding circumstances causing the tap to be placed, and also the product of the tap.

Q And regardless of whether any individualized review was made, the tap would continue to be legal indefinitely.

MR. HUNDLEY: Well, I object. We've been through this over and over again.

THE WITNESS: Well, if you want me to restate it, I will. But I don't accept your conclusion.

MR. SLOCOMBE: I have no further questions.

MR. CHRISTENBURY: Excuse me. I just have a couple of brief questions to clarify the record. Mr. Slocombe asked several questions in the negative and just to make sure the record is clear I would like to ask them in the affirmative.

FURTHER EXAMINATION BY COUNSEL FOR FEDERAL DEFENDANTS BY MR. CHRISTENBURY:

Q With respect to the surveillance of Dr. Halperin, did you ever instruct the Bureau to look for information regarding domestic politics?

A I did not.

Q With regard to the personal lives of the subjects of the surveillance?

A I did not.

Q Or any information regarding dissent from Administration's [95] procedures, apart from any connection to national security leaks?

A If we use that phrase "currently accepted," the answer is no.

Q And with regard to your earlier testimony that it was your good faith belief that these surveillances were lawful, was that based on other practices of other Attorneys General for 25 years or so prior to your tenure?

A It was. It was based on departmental policy which existed when I arrived on the scene.

MR. CHRISTENBURY: Thank you.

MR. SLOCOMBE: Thank you.

(Whereupon, at 4:45 o'clock p.m., the taking of the instant deposition ceased.)

_____

Signature of the witness

SUBSCRIBED AND SWORN to before me this _____ day of _____, 1975.

_____

Notary Public

My commission expires _____.

[96] CERTIFICATE OF NOTARY PUBLIC

UNITED STATES OF AMERICA

ss.:

DISTRICT OF COLUMBIA

I, JOANNA B. LICHTMAN, the officer before whom the foregoing deposition was taken, do hereby certify that John N. Mitchell, whose testimony appears in the foregoing deposition, was duly sworn by me, a Notary Public in and for the District of Columbia; that the testimony of said witness was recorded by me by Stenomask and thereafter reduced to typewritten form under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative of or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

_____

Notary Public in and for the District of Columbia

My Commission expires June 14, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-13

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

Tuesday, March 30, 1976
Washington, D.C.

Deposition of HENRY A. KISSINGER, taken on behalf of the plaintiffs, in the Secretary's Conference Room, Department of State, Washington, D.C., beginning at 4:13 p.m. before Terry Barham, a notary public in and for the District of Columbia, when where present on behalf of the respective parties:

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PROCEEDINGS

Whereupon,

HENRY A. KISSINGER

was called as a witness and, having been duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. SLOCOMBE:

Q For the record, this deposition is taken pursuant to notice. We understand, Dr. Kissinger, that you have to leave at 7 for a prior commitment, and we will try and finish by that time, but we will continue if necessary.

How long have you known the plaintiff, Morton Halperin?

A We met at Harvard. It was in the sixties. I don't remember the exact year—'62, '63, somewhere in there.

Q Could you describe your decision to hire him to work on the NSC staff as to time and the reasons for your decision?

A Well, Mr. Halperin was my assistant in the Defense Policy Seminar at Harvard for I forget how many years—one or two years. And I had known him favorably prior to that due to his work at Harvard. Somewhere in that period he worked in Washington in the Defense Department for a while. [6] I don't have the time exactly straight. But, at any rate, he and I used to talk that, even before I went to Washington, that if I ever went to Washington I would recommend him, or if anyone I knew got to Washington, because of my high opinion of him.

Therefore, when I was offered the position of Assistant to the President, he was one of the first people I contacted. I think it was in December of '68.

Q So that he began working for you prior to the inauguration?

A That's right.

Q And can you say briefly the reasons why you hired him for the position that you wanted him to perform on the NSC staff?

A Well, first, I seem to have a recollection that he did planning when he worked for ISA, but then he went—he seemed to me to have an unusual combination of theoretical and practical ability. The position he was to perform on the NSC staff was actually partially designed by him as to where he could be more useful. We had many conversations prior to my actually moving to Washington, after I had been appointed but before I took my position, in which we jointly designed his position, and he was supposed to do the planning [7] within the NSC staff, that is, the definition of the options. And that out across the geographic divisions within the NSC staff, and the technical divisions.

Q With whom did you discuss your decision to hire him to work for you at the White House?

A I frankly don't remember if I discussed it with anybody before I hired him. After I hired him, I certainly mentioned him, together with many others, to the President, and certainly to Haldeman and probably Mitchell. But I don't remember the exact sequence here.

Q In your answers to the written interrogatories, you indicate that Senator Goldwater and General Wheeler raised some objections to his being hired.

A That is correct.

Q What was the nature of those objections?

A The objection of General Wheeler was twofold—one, that Mr. Halperin had, in his view, systematically leaked matters concerning the Vietnam war while he was in the Defense Department, and, secondly, had, in the view of General Wheeler, systematically undercut the military. This is one of the conversations I remember. I expressed by strong view that I needed Mr. Halperin, that I was generally familiar with his views, and that, in any case, I was responsible for the basic [9] holdover from the previous

Administration, who had systematically undermined the military, or something to that effect. And that was one discussion.

And Mr. Mitchell also had been approached by Senator Goldwater.

Q About Dr. Halperin?

A That's right.

Q That letter was addressed to President Nixon and would presumably be in the White House files?

A That is correct.

Q You were not given a copy—you saw a copy?

A I saw a copy at the time. I have also since seen a copy.

Q Do you know where a copy exists now?

A I think we have a copy.

MR. KEUCH: Would you like a copy produced?

MR. SLOCOMBE: Yes.

MR. KEUCH: I think we should make clear for the record that the copy is an unsigned copy. As you have indicated by your question, Mr. Slocombe, the original, we assume, is in the White House files.

MR. SLOCOMBE: And the copy was obtained from Senator Goldwater?

[10] THE WITNESS: That's correct.

MR. SLOCOMBE: Just for the record, we have filed comprehensive document requests, and as documents relevant to the matter came to light, it has been the practice that they are sent to us, and we would appreciate it if that continues.

BY MR. SLOCOMBE:

Q In your discussions with Attorney General Mitchell and Mr. Haldeman, did any of them, other than what Mr. Mitchell had been told by Senator Goldwater, did any of them express any opinion as to hiring Morton Halperin?

A My recollection is that Mr. Haldeman made a general objection to many of the types of people that I had hired, because many of them were holdovers from the previous Administration, and Mr. Halperin's name was generally cited as the prime example.

Q Other than that, were there any discussions at which objections were raised to hiring Morton Halperin?

A That is all that I now remember.

Q And it is these discussions that you had reference to in Salzburg when you said that two of the people, one of whom presumably is Morton Halperin, were hired over the strong objections of all my associates?

[11] A That is correct.

MR. KEUCH: Mr. Slocombe, at this point, we have also been able to obtain recently a copy of the letter referred by—to Attorney General Mitchell from Mr. Goldwater. Would you like a copy of that record?

MR. SLOCOMBE: Yes.

MR. KEUCH: I might note that that is excised only in accordance with our protective order to protect the indentity of third parties.

BY MR. SLOCOMBE:

Q In your answers to the interrogatories, you discuss some ojections raised on security grounds, other than General Wheeler's objections.

Why did you not include in your answer to the interrogatory, General Wheeler's claim that Mr. Halperin had systematically leaked information about the war?

A Well, I didn't give any of the reasons. I simply stated that in my recollection he recommended against Mr. Halperin's employment, I did not state the reasons why he recommended against it.

Q One of the items identified in your Senate testimony—and this is not the reference, it is not in the printed version, it is on page 14 of your answers—refers to line 38 of page 182 of the printed transcript of that testimony, and [12] similarly on line 40. The substance is that he falsified a passport application with respect to his connection, his contact, with Soviet citizens, and that he had not reported on a passport application a visit to the Soviet Union that he had made previously.

The document which we believe is referred to is this, which will be Plaintiff's Exhibit A.

(The document referred to was marked for identification as Plaintiff's Exhibit A)

MR. KEUCH: Mr. Slocombe, do you have the Senate testimony rather than just refer to a line out of context? It will be helpful if we have it.

MR. SLOCOMBE: It is page 182. The full text of your answer would be, "In the case of Halperin there was an FBI allegation that he falsified a passport application with respect to his connection with his contact with Soviet citizens, and that he had not reported on a passport application a visit to the Soviet Union that he had made previously."

We have obtained through the Justice Department from various sources Dr. Halperin's security file, and the only document in it we could find which appears to be the subject of this reference is a statement of personal history, [13] which is Plaintiff's Exhibit A.

BY MR. SLOCOMBE:

Q That is, is it not, not a passport application but a form that one fills out to get a security clearance?

A I don't know what this statement is, and I had never looked at Mr. Halperin's security file.

Q How, then, was the allegation conveyed to you that the FBI had maintained that there had been an error in a passport application?

A This was mentioned to me orally on a number of occasions, once by Mr. Ash—and I forget all the FBI sources, but I had heard that statement on several occasions.

MR. SLOCOMBE: The Plaintiff's Exhibit B will be a 10 July 1968 memorandum from a security official in the Department of Defense, which was referred to in your answers to interrogatories.

(The document referred to was marked for identification as Plaintiff's Exhibit B)

MR. KEUCH: Give us what question that is, Mr. Slocombe.

THE WITNESS: Maybe that is what I was referring to. [14] BY MR. SLOCOMBE:

Q Are you quite sure that it was a discussion with people who were relying on FBI sources that these allegations were made?

A I think it ought to be clear that something that happened six or seven years ago, and that was not the principal occupation in my life, would not leave me with precise recollections of who said what. A few things I remember precisely. This got into my universe of knowledge, and I would not be absolutely certain by what avenue it got there.

Q In your discussion with the Senate, discussing this matter, you said—and this is supplying the insertions—on page 183, "In the case of Halperin I thought that given the many travels he took, it was an understandable lapse that he would forget to put down every last trip that he had taken over the requisite period."

Does that fairly state your continuing view of the business about the form?

A I was told by Mr. Ash at the end of January when he called on me with respect to Halperin's security clearance, that in his view, in cases of doubt, it should be resolved in favor of the government and against the applicant. I did not look at the file myself, I had General Haig look at it. [15] In thinking about it, that was my view then. I insisted that a security clearance be given. And it obviously remains my view.

Q With reference to General Haig's role, you said to the Senate Committee—or he said to the Senate Committee—"I would say around April or May 1969, Dr. Kissinger asked me to review for him a number of security files on personnel that he had assigned onto his staff and on which there was some grievous controversy whether these things should be taken on the staff. In several instances, the former security officer for the National Security Council staff had recommended against their being given clearances, and Henry asked me to look at their background files and give him a judgment as to whether or not they were victims of overly zealous criteria, and in each instance I did come to the conclusion—and I told him so."

Is that an accurate summary of your instructions to him?

A That is substantially accurate.

Q And that his conclusion was that the objections were what he calls "overly zealous criteria"—based on what he calls "overly zealous criteria"?

A I had not thought of it in these terms, but it is [16] a fair summary of our judgment.

Q With respect to Mr. Ash's view, Plaintiff Exhibit C is a handwritten memorandum to you from Mr. Ash, which, reading from a slightly better copy, reads as follows. It is dated March 3, 1969. "Dr. Kissinger re Morton Halperin. 1. The attached FBI summary reflects generally favorable information resulting from the FBI background investigation. 2. The reference to the mother (page 10) does not appear to have significance. 3. FBI informed me that they interviewed Halperin to alert him to the Soviet intelligence interest (page 12). 4. Teach-in activities (page 11). 5. Soviet contacts (page 13-14). 6. Vietnam views (page 15).

"I will pick this up from your office when you are through with it.

"Ash."

(The document referred to was marked for identification as Plaintiff's Exhibit C)

Do you remember receiving that memorandum, or a memorandum to that effect, from Mr. Ash?

A I don't remember it, and you have to remember—you have to keep in mind that my office received hundreds of documents a day, that my usual procedure was to turn this sort [17] of thing over to General Haig and ask for his recommendation, and we would at the end of the day discuss orally the issue that would be presented by a case such as Halperin's, particularly when I had formed some fairly definite views about it already. I don't remember that.

Q I call your attention to the initials "HAK" in the upper righthand corner, and ask whether they indicate in any way whether you would have seen this note?

A Well, normally—normally, when I indicate that I have read it, I make an "HK" in this form. This is the way that I would indicate it. This would not be my mark on this

document. And I don't say I didn't see it. I am certainly generally familiar with its contents.

Q Does anything in that reflect a recommendation by Mr. Ash not to hire, or not to clear, Morton Halperin?

A The recommendation of Mr. Ash to me was made orally, and it was expressed in the language that I have repeated here, which was that there was a substantial doubt and that this doubt should be resolved in favor of the government, even if there was not enough technical information to deny a clearance on security grounds.

Q And that statement was made orally, if I remember [18] your earlier testimony correctly, in January of 1969?

A Shortly after I came into my position, yes.

MR. SLOCOMBE: The next exhibit, I think is E—is a February 25th, 1969, memorandum to you from Mr. Ash.

(The document referred to was marked for identificatin as Plaintiff's Exhibit E)

THE WITNESS: By the time this handwritten note, to get back to the previous question, was submitted to me, Mr. Ash already knew my feeling, since I had told him orally that I was leaning in the other direction.

MR. SLOCOMBE: The second paragraph of that memorandum reads: "The FBI has completed its investigation and the results have been made available for your consideration. From the standpoint of loyalty and security, no adverse information has been developed which would preclude confirmation of the initial clearance action. Accordingly, in the absence of advice from you to the contrary, there is being continued in effect the NSC top secret clearance previously granted to Mr. Halperin."

BY MR. SLOCOMBE:

Q Do you remember receiving that memorandum?

A I don't remember it, but it has an initial in the [19] upper righthand corner which looks as if I had read it.

Q So that by the end of February, 1969, Mr. Ash was prepared in writing to withdraw whatever objections he may have made previously?

A I would have to be precise—at the end of January, 1969, he had not made a formal objection either. He had simply pointed out to me that, while he was not entering a formal objection, he wanted me to be aware of the fact that doubts should be resolved in favor of the government, and Ash's subsequent actions would be consistent with that previous position.

Q On page 20 of your answer, you said "My recollection is that Mr. Ash recommended against hiring Mr. Halperin."

A That is correct.

Q The reconciliation is, as you stated—that is, that he had a general view, but he did not press it.

A He recommended to me that I should not proceed with the hiring, though he did not have conclusive evidence on which to base an adverse security recommendation.

Q Why, if his only view was that he did not have conclusive evidence, would he have put in a letter to you "From the standpoint of loyalty and security, no adverse information has been developed which would preclude confirmation of the initial clearance action."?

[20] MR. KEUCH: Mr. Slocombe, I have to object to that question as asking the witness to speculate as to what was in Mr. Ash's mind. I think that the person to address that question to is Mr. Ash.

For the record, I will instruct the witness not to answer.

BY MR. SLOCOMBE:

Q Did you have any discussion with Morton Halperin in 1969 about his security file, which you recall?

MR. KEUCH: Mr. Slocombe, could we take a pause just a moment, go off the record for just a minute? I need a minute to look through the interrogatories.

(Off the record briefly)

MR. SLOCOMBE: Back on the record.

THE WITNESS: I have no precise recollection of any conversation except one that I had in May, in which—

BY MR. SLOCOMBE:

Q Other than the one in May.

A I have no recollection of one.

Q When you hired him and confirmed his clearances, did you regard the security points that had been raised in respect to his case as raising any question in your mind as to his discretion or ability to keep confidences?

[21] A No.

Q Turning now to the latter part of April, 1969, you said in your answers to the interrogatories, with reference to a meeting—page 17—for reference we have numbered the lines. We are talking now about lines 11, 12 and 13 on page 17. "The meeting among the President, the Attorney General and Mr. Hoover took place in the Oval Office of the White House. It was in progress when I was called in. President Nixon, Mr. Mitchell and Mr. Hoover were present."

It is your clear memory that Hoover, Mitchell and President Nixon were all in the same room when you entered?

A Yes.

Q Reading from lines 5 through 9 of the same page—"It appears that this meeting most likely occurred on April 25, 1969. On that day, according to White House, FBI and Department of Justice logs, the Attorney General and Mr. Hoover were at the White House before leaving with the President by helicopter for dinner at Camp David."

I take it that you did not remember the specific date initially?

A I did not.

Q And what review of documents, logs or other materials was made as the basis for the answer which I have just [22] read?

A The review of White House logs of Presidential phone calls and Presidential meetings, which suggested that April 25 was the day on which the President called Hoover several times, or at least called him—I don't know whether it was several time—that can be determined—and in which they then went to Camp David, and it fitted the time frame in which I remembered the meeting having taken place.

Q Who performed this review of the logs on your behalf, unless you did it yourself?

A I didn't do it myself, and I frankly don't remember.

Q Who told you the conclusion that they had reached that the White House, FBI and Department of Justice logs indicated that the Attorney General and Mr. Hoover were at the White House?

A Well, I looked at the White House log myself. Now, where that is I don't know. And that was produced for me by my then White House office. That log I reviewed myself. The Justice Department logs I didn't review.

MR. KEUCH: I think, if you have no objection, for the record I think we should mention the review we are talking about took place prior to Dr. Kissinger's appearance at [23] the July '74 hearing. Is that the review that you are referring to?

MR. SLOCOMBE: I don't know. It is whatever review it was that led you to the conclusion that it was on April 25, 1969—

THE WITNESS: Prior to the July '74 hearing.

BY MR. SLOCOMBE:

Q Do you remember who you consulted in the course of preparing for those hearings?

A Well, I consulted with General Haig, and I probably asked General Scowcroft to find me the logs from which one could deduce at what day Mitchell, Hoover and the President were most likely to have been in the White House. And then from the general activity of the President that day, it was deduced that this was the most likely day.

Q I show you what I take to be a White House log, probably the one you are referring to, which is Plaintiff's Exhibit F, April 25, 1969.

(The document referred to was marked for identification as Plaintiff's Exhibit F)

The omissions have been represented to us as not including any reference to any defendant in this case, other [24] than presumably the President or Mr. Hoover, that is, it has been represented to us that we have on this page all references to defendants in this case and Mr. Hoover—also on the second page.

Does any part of that log indicate that Mr. Hoover was at the White House at any time on that day? I realize there is a reference to a two-minute telephone call at the bottom of the first page. That is not a reference as being at the White House.

A Well, he was certainly at the White House to meet with the President on the helicopter.

Q I call your attention to the document identified as Appendix D, which is the fourth page, which is a list—purports to be a list of people who were on that helicopter flight. Mr. Hoover's name does not appear.

A Well, I can't explain that.

Q Do you have any reason to believe that the list of who was on the helicopter would not be correct?

A I have no reason to believe anything with respect to that. I just don't know how these records were kept.

Q Excuse me?

A I don't know how the records with respect to helicopter flights were kept.

[25] Q But what part of this log was it that led you to the conclusion that it must have been April 25th, because the log showed that Hoover was at the White House on that day?

A My understanding was that Mr. Hoover had been on the helicopter and that he had spent the evening in Camp David with Mr. Mitchell and the President.

Q There has been some speculation that Mr. Hoover and Mr. Tolson, who—at least Mr. Hoover—didn't like airplanes, drove up. It is clear that they were at Camp David. You were not at Camp David.

A I was not.

Q Do you have any further information, any other log or White House records, other than the ones that have been produced to us, in connection with our various requests, to support the reference to White House logs, FBI and Department of Justice logs, showing that Mr. Hoover was at the White House on the 25th of April, 1969?

A I don't have any, no.

Q You referred in an earlier answer to having looked at a log personally. Is this the log that you looked at?

A I looked at a log—I don't know whether that is the log.

Q Then I will repeat my question. I ask you again [26] to look at this log carefully, and tell me whether it is the log which you believe you consulted.

A I was under the impression that I had seen something that indicated that Mr. Hoover had been at the White House that day. Now, I cannot explain—I have no specific recollection of what particular log I looked at.

Q Did it look similar in format to this?

A I suppose so.

Q Do you have any doubt that this is the log that you looked at?

A I did not personally review all the evidence with specific care. I asked people to look for a date in which this could have happened, since my recollection of the meeting is extremely precise.

Q But you also testified that you personally examined the log, which indicated that Mr. Hoover was at the White House.

MR. KEUCH: Mr. Slocombe, where is that testimony?

MR. SLOCOMBE: What he just said a few minutes ago.

MR. KEUCH: I think he indicated that he examined—in his answer to the interrogatories, which you referred him to on page 17, he talks about the various documents—in answer to question 14, White House, FBI and Department of Justice [27] logs, as to setting up the date of the meeting.

MR. SLOCOMBE: If I understand his testimony this afternoon, it was that, although he did not examine all the evidence, he did personally look at a White House log, and I am trying to establish whether that log is the document which is Plaintiff's P.

MR. KEUCH: I will accept the version of a White House log, that's fine.

MR. SLOCOMBE: There is Mr. Hoover's diaries and his list of phone calls, and I understand the testimony to be that he didn't examine that, but he did examine the Presidential diary, the White House log.

This is the only White House log which has been provided to us, as a White House log of April 25th.

BY MR. SLOCOMBE:

Q Were there any other documents which you relied on in reaching that conclusion?

A No.

Q Does this discussion in any way refresh your recollection as to who the people were when you consulted about this matter in, I take it, April of 1974, or prior to your testimony in April of 1974?

A I am sure I talked to General Haig and I talked to [28] General Scowcroft to see whether they could find out from the records that they had available what was the most probable date that this meeting took place.

Q Turning to the substance of your answer with respect to the discussion at that meeting, on page 18, lines 4 through 9, you said "I was also told that three categories of individuals would be subject to wiretaps: those with unfavorable information in their security files, those who had access to information which had leaked, and those

whose names appeared as sources or recipients of leaked information in FBI investigations, including wiretaps."

Was it your understanding that every one in those categories was to be tapped?

A I don't know whether I formed a concrete opinion whether it meant that everybody in those categories would be tapped, but that certainly people in those categories would be eligible. Or would be submitted for investigation.

I have also testified that the submission of a name included a high probability of a wiretap, not the certainty of a wiretap.

Q Your answer says that these would be people who would be subject to wiretaps. Was there a different discussion of people who would be investigated?

[29] A The presumption was that in the investigation of these categories of people, wiretaps could be used.

Q Did you form any understanding as to how the group of people who would fit these categories would be narrowed down to those who would actually be wiretapped?

A My impression was that those in the category—who had unfavorable information in their security files, would be supplied by the FBI, and indeed were supplied at that first meeting by Mr. Hoover; who were the prime subjects—who emerged as the likely suspects in an investigation, was left undermined, but the probability was that since the investigation was conducted by the FBI, they, too, would be submitted by the FBI. Those who had access to the information which had leaked would generally be supplied by my office. And that was, in my mind, the rough division that was to be followed.

Q And the person had to come in both categories to be tapped?

A There had to be a leak or some event which required the submission of a name. Those whom Mr. Hoover had designated as his having doubts about their security status were obviously subject to these investigations, and who

would emerge as a [30] suspect during the course of the investigation would have to be left to the investigation.

Q Was being a holdover from the previous Administration a criterion for inclusion in the list?

A No.

Q I would like to call your attention to lines 11 through 13 of the answer—"I was asked to supply the names of key individuals having access to sensitive information which had leaked."

By whom were you asked?

A I have no specific recollection which individual. The consensus of the meeting was that these were the three categories, and that it was my responsibility to supply those names. And the general decision was made by the President.

Q I call your attention to your answer to question 388, which appears on page 30, when you say "There were a number of persons who knew about the Cambodia bombing. They included the President, those in the military line of command who carried out the bombing, the Secretary of Defense, staff officers and others assigned to the project, persons in the White House situation room, Chairman of the Joint Chiefs of Staff, and, in my office, General Haig, Mr. Eagleburger, Halperin and probably Sneider."

[31] That would be a substantial number of people, would it not?

A That is correct.

Q What, then, is the force—and I take it that you never supplied a list of all the people you think of who in fact had access to the information?

A My primary responsibility was to supply the names of those people in my jurisdiction who had access to the information.

Q Then did you supply a list that included yourself, General Haig, Mr. Eagleburger, Mr. Halperin and Mr. Sneider to anybody?

MR. KEUCH: Mr. Slocombe, we are going to object, because, as you know, we have taken the position that in

this case we cannot go into whether other people were involved in this program. We think that we are defending this particular surveillance, and the questions are how Mr. Halperin was on a list under these criteria.

And we will object to the question as to whether other individuals were in fact reported.

MR. SLOCOMBE: I am not asking whether these people were wiretapped or not, I am asking—he has identified these as the people who had access—he has already identified them. [32] I am asking whether he ever conveyed that list of people who had access to anybody else.

MR. KEUCH: You are asking whether or not he conveyed a list, and the purpose of conveying the list was to conduct an investigation. And our position has been clear throughout that we are concerned about the investigation of those steps taken in regard to Mr. Halperin, not as regards third parties.

BY MR. SLOCOMBE:

Q Let me ask the question this way and see if you persist in the objection.

Did you supply a list to anyone of all the people who, to your knowledge, had access to the Cambodian bombing information without regard to whether they had adverse security information in their files or whether they were likely to have leaked?

MR. KEUCH: I have no objection to that question.

THE WITNESS: We submitted several names, but not all the names.

BY MR. SLOCOMBE:

Q Your answer, then, is that you did not in fact supply a list of all the people who had access to the bombing information?

[33] A That is correct.

Q Did John Davidson and ___ have access to the bombing information?

A No, they were there under different criteria.

Q On page 18, lines 26 through 28, you said "In the course of the meeting I was assured that the wiretap program envisioned was entirely lawful in the opinion of the Attorney General, and that the Bureau had established procedures for such a program."

What did you understand those established procedures to be?

A Explain the question, please.

Q You said that you were assured that the Bureau had established procedures for such a program, that is, a wiretap program.

What did you understand those procedures to be?

A The FBI procedures, insofar as they might relate to my office, were to submit for investigation of a leak the names of people who had had access to the leaked document, the names of people that had been previously established as having questions raised with respect to their security status, or the ____ of people who somebody had identified as the prime suspects in the investigation as a result of an investigation. These [34] names were submitted, then, by General Haig to—with my authority—to the FBI. The FBI then made the decision as to which procedure to follow, that is to say, whether in fact the investigation would include wiretapping. They would then get the authority for the wiretap from Mr. Mitchell, and if the wiretap showed information that they believed to affect national security, the FBI would then inform my office of that fact.

Q With reference to how a wiretap would be conducted once installed, what was your understanding as to what records would be kept with respect to the wiretaps?

A You have to understand that this was a very minor part of my activities, and therefore I did not address the details of the operation. All I knew was that periodically, very rarely relatively, a letter would show up in my office calling attention to what in the FBI's view was a national security comment made by some of the people that were being wiretapped. These letters did not include all of the

names that had been submitted, and therefore we had no way of knowing whether in fact every name that had been submitted was in fact wiretapped.

These reports would come to my office, and I would note them when I read them, which was even rarer than when they came to [35] my office.

Q Turning to the question of the names that you submitted—among the names of those who had access, how did you decide which ones to submit?

A I attempted to keep it to the smallest number possible. If somebody fitted more than one category, then that was an obvious name to submit.

Q You understood that you were to apply some of the other categories as well as the category of who had access?

A I in any event considered that I had to submit the names of those that had been listed at this Oval Office meeting. When they also had access to the information, that was an additional factor.

But in fact we submitted all the names that had been established fairly quickly.

Q Established when?

A At that meeting, which I assume was on April 25th.

Q Those names were Halperin, Sonnenfeldt and Brandon.

MR. KEUCH: We will object to any part of the question other than as to Mr. Halperin.

BY MR. SLOCOMBE:

Q Is it a fact that of all the persons who had access, who worked for you, the only name that you submitted was [36] Morton Halperin?

A In that first group, that is correct.

Q With respect to the procedures, you, then, had no understanding as to what records would be kept?

MR. KEUCH: Excuse me, make it a little more specific. Are we talking about the FBI procedures?

MR. SLOCOMBE: The FBI procedures—well, assuming the FBI was to run the tap, yes.

THE WITNESS: I had no knowledge of what they were doing.

BY MR. SLOCOMBE:

Q With respect to how reports would be filed?

A All I knew was that there would be two reports, one coming to my office and one coming to the President's office, which I assumed went to Mr. Ehrlichman.

Q Did you have any understanding with respect to whether the actual tapes of the overhears would be retained by the FBI?

A I have no knowledge, I never saw one.

Q Did you have any understanding with respect to whether there would be renewal authorizations at regular intervals?

A I again have no knowledge of that.

[37] Q Did you know that the FBI procedures in fact required such renewal?

A No.

Q There was no discussion that you ever attended of not following these regular procedures?

A No.

Q Was there any discussion of minimizing unnecessary interceptions, that is, interceptions not related to national security information?

A This whole subject was one that I did not particularly understand or was particularly wild about. I assumed that there was a regular procedure which the FBI followed, and all I received was the final product in the form of a summary letter.

Q But you did not participate in any discussion of avoiding the interception of privileged communications, for example, as a category of minimization?

A I just had no way—I never received any and, therefore, I didn't even know whether they did it. All I received were letters that in the judgment of the FBI bore on the question of national security.

Q Did you have any discussion at this time or any other time as to the length of time the taps would be on?

[38] A No.

Q To go back to a prior answer, you say it is not a subject you were wild about.

Would you explain what you mean by that?

A Well, Mr. Halperin had been a close associate of mine for many years. I could have solved the problem very easily by letting him go. I wanted to keep him on my staff and to keep an association with him. And I reluctantly went along with this approach as the lesser of two evils, in my view—and as being necessary in the interest of national security.

Q I call your attention to two references on page 18, one on line 16 and one on line 29, in which you say in your answers, in the first case, "Director Hoover identified four persons as security risks, and suggested 'that these four be put under surveillance initially.' " And then, on line 29, "Director Hoover assured President Nixon that wiretapping in similar situations had been a common practice in previous Administrations."

You affirmatively remember hearing Hoover say those words in your presence?

A Yes, because this was a rather startling piece of information to me. And the context of the discussion was, [39] President Nixon asked him what could be done about the leak problem, and Mr. Hoover replied that the only solution was wiretapping, which had been done extensively, as I remember his words, in the previous Administrations. I have no evidence of that, but this is what he said.

Q In the discussion of the Attorney General's opinion on the lawfulness of the program, referred to in line 27 and 28 of your answer, how was that opinion expressed?

A The Attorney General indicated that he had the legal authority to institute such a program and that, therefore, it could be handled by the Justice Department.

Q Did he make any reference to the source of his legal authority?

A No.

Q Did he refer to any cases?

A No.

Q I ask the question only because there has been testimony, in an oral discussion—the name of a case called Katz and Berger was mentioned by the Attorney General. Do either of those names refresh your recollection as to whether he referred to specific cases?

A I don't believe that any cases were mentioned in that conversation. They might have been mentioned in some [40] other conversation.

Q Was there any discussion of any limits imposed by law or by the Constitution on wiretapping?

A No. The whole discussion was in the context that there was a well-established practice, extending over many Administrations, which would be followed.

Q There was, therefore, no discussion on the procedures for initiating the tap, whether there had to be regular reauthorizations, how long it could go on, what kind of information could be picked up?

A The procedure for initiating the tap was as I described.

Q I don't mean in identifying names for this particular case, but whether a warrant was required, what kind of information was necessary. There was no such discussion?

A No, and I didn't inquire into it, given the type of people who were present.

Q Meaning the President and the Attorney General and the Director of the FBI?

A The President, the Attorney General and the Director of the FBI, all of whom seemed to affirm without challenge, in the fourth month of an Administration, that this was a practice that had been followed in the past—and, indeed, in [41] the case of one person on my staff, I

had been offered wiretap information when he was hired. So this reinforced my view that it was a common practice.

Q I take it that that person was not Morton Halperin?

A It was not Morton Halperin.

Q On page 18, lines 23 through 25, "It was my understanding that President Nixon directed surveillance of the persons. . ."—

A I did not, incidentally, accept—I did not look at the wiretap information at the time, but it was told to me that it existed.

Q "It was my understanding that President Nixon directed surveillance of the persons then suggested by Director Hoover."

What was the basis for that understanding?

A My understanding was that the President ordered the whole program, and that this included the names of the people that Director Hoover had mentioned.

Q Did he say anything to that effect?

A The understanding with which I emerged from that meeting was that the whole program was approved, including that the authority was given to Hoover, not to me—the authority was given to Hoover to tap those people that had [42] been mentioned.

Q Did it mean to you that Mr. Hoover was to start taps on those four without any further instruction or signal from anyone, if he decided it was necessary?

A My understanding at the time was that this would be a procedure that would go into effect when there was another request for a security investigation—for an investigation of news leaks. My impression was that he substantially had the authority once the investigation started.

Q Who would have to request such an investigation to trigger these four taps?

A The investigation would be triggered by a news leak of a kind that had been identified by the President as constituting a national security problem.

Q Was Mr. Hoover to decide when a leak was of that character?

A Well, in practice—I don't know if that question ever was decided. The fact of the matter was that on May 9 such a leak occurred, and I was asked by the President to call Mr. Hoover to start an investigation, and that is what appears to have started the whole process.

Q And the four people who are involved includes Henry Brandon?

[43] MR. KEUCH: Again, we are going to raise an objection to anyone other than Mr. Halperin.

MR. SLOCOMBE: This testimony illustrates the difficulty of that position. The argument is, Mr. Hoover had authority to tap four identified people on the happening of a certain event. There is a good deal of evidence in the public record that that list of four people included a person who was not tapped on the 9th or 12th of May.

And it seems to me very relevant to question the origins of the Halperin tap, whether it in fact grew out of this list of four or out of some other basis.

MR. KEUCH: Well, again, I can't accept the characterization that it is the argument that. If you wish to say that there has been testimony that—

MR. SLOCOMBE: Testimony.

MR. KEUCH: But, again, it is our position in this case, as it has been consistently, that we have to defend the surveillance in this case, of Mr. Halperin, and that he has no standing to raise the surveillance involving anyone else.

MR. SLOCOMBE: We are not raising any claim on the basis of anybody else being surveilled. We are trying to find out the circumstances of Mr. Halperin's surveillance.

MR. KEUCH: I think in being given the criteria and [44] the circumstances under which names were provided, the fact that when Mr. Halperin's name was provided—I think we have satisfied these requests, and we will object to a question concerning any third party.

MR. SLOCOMBE: I think it is not a matter of dispute that the four who were listed—the four who are referred

to on page 18 by initials, that is, (A), (B)—and (C) and (D) are the same person, I think we have agreed to that—and that the person who is referred to as (C) and (D), whom we believe to be Henry Brandon, but I don't want you to confirm or deny that, if it is your position you won't—was not the fourth person who was on the list that was sent over on May 10.

Is that common ground?

MR. KEUCH: Well, I think you can characterize the public record any way you wish to, sir, but I think as to the record in this case our position is that we will not discuss the identity of third parties, for the reasons stated.

MR. SLOCOMBE: I am not asking you to discuss identity, I am asking you to discuss—are we agreed that the four names referred to on page 18, that there are indeed only four names referred to on page 18, although there are four initials plus Halperin—and that the person referred to as (C) and (D) is not one of the four—on page 31, there are three initials, [45] N, O and P. First of all, it has been represented to us that those are all the same person, and that that person is not the person referred to as (A), (B) or (C) and (D).

We are talking about two lists of four which differ in one name.

MR. KEUCH: If your question to me, Mr. Slocombe, is, are (C) and (D) the same individual, on page 18, I will state that that is so. And I will agree with your characterization — I think we have already informed you previously.

MR. SLOCOMBE: To get it on the record. Just to be clear, on page 31, N, O and P are the same person, and that it is not the person referred to as (C) and (D) on page 18.

MR. KEUCH: Right.

BY MR. SLOCOMBE:

Q Dr. Kissinger, that corresponds to your understanding of those answers as well?

A What is the question—what is the precise question?

Q How the code letters work.

MR. KEUCH: On this response as to the four individuals, the statement is the fourth was (C), when Hoover had claimed the connection. I believe the Director also permitted physical surveillance of (D). While protecting [46] the identities of third parties, we have informed counsel that (C) and (D) are the same individual.

THE WITNESS: Yes, that is my understanding also. That (C) and (D) are the same individual?

MR. KEUCH: The Secretary has not had the benefit of—on your request we did check those records to make these responses to you.

Why don't we defer that question, if we can, and—

THE WITNESS: Why don't I check it during the break, and then answer that question.

MR. KEUCH: That would solve the problem.

MR. SLOCOMBE: All right.

BY MR. SLOCOMBE:

Q Exhibit C is an affidavit which you filed in another litigation, but it refers to this wiretap, as is clear from paragraph 2 of the affidavit.

(The document referred to was marked for identification as Plaintiff's Exhibit G)

Paragraph 7 reads "In early May 1969, after the first several unauthorized disclosures of classified information had occurred, the President consulted the then Director of the Federal Bureau of Investigation, J. Edgar Hoover, and [47] the then Attorney General of the United States, John N. Mitchell, concerning methods to be employed to deal with the problem. The President was told by Mr. Hoover that the most effective method was that that had been followed in previous Administrations, namely, the conduct of electronic surveillance in accordance with specific procedures.

"The President was assured by Attorney General Mitchell that such action would be in compliance with law. My office was required by the President to submit the

names of those officials who had had access to the information which had been leaked. Obviously my office was the natural place for the information to exist and Dr. Halperin, in his position as Chief of the National Security Council Planning Group, was unquestionably one of several persons who had had access to such information."

Why in that paragraph did you not include any reference to Mr. Hoover being the person who first named Dr. Halperin as a person to be tapped, or suspect of leaking?

A Because in this paragraph I was addressing that part of it which applied to my responsibility. The difficulty in the case of Mr. Halperin is that he fitted every criterion that had been established.

Q But the paragraph refers, does it not, to what the [48] President was told by Mr. Hoover and what the President was assured by the Attorney General?

A I have forgotten the context in which this affidavit was submitted, and I can only state what I know to be the facts, which I have done.

Q So you don't want to add anything to why you omitted the reference to Hoover identifying the four people to be wiretapped?

A When this wiretap case first came up in 1973, my recollection was extremely—I did not have an opportunity to go over all the details that later investigations forced me into examining. But beyond that I can't speculate now why I did not give the complete version that I now have at my disposal.

Q Did you remember in November 1973 that Hoover was the source of the names?

A I want to repeat, every category applied to Mr. Halperin, and, therefore, he came up in every category. And it is therefore difficult, without focusing on the particular details, to draw the line between whether his name came up only on the basis of this Oval Office conversation, or whether it was also on the basis of his having access to information, or whether it was on the basis of Mr. Hoover having listed him on May 9 as the prime [49] suspect, since

Mr. Hoover called me on May 9 to inform me that Mr. Halperin was the prime suspect, that he had been a roommate of Mr. Beecher who had written the story.

It is very difficult to draw a distinction here between all the cagetories.

MR. KEUCH: To keep the record complete, Mr. Secretary, I take it the story referred to is the Cambodian bombing story?

THE WITNESS: That is correct.

MR. KEUCH: Thank you.

BY MR. SLOCOMBE:

Q Were there any other discussions in which you participated prior to May 9, 1969, at which countermeasures, including wiretapping—the leak, was discussed, as contrasted to general concern about leaks, but what to do about it was opposed to how serious a problem it was?

MR. KEUCH: By any other meetings, do you mean any other meetings other than the April 25th meeting?

MR. SLOCOMBE: Other than the meeting at which Mr. Hoover and Mr. Mitchell and the President were all at the White House.

THE WITNESS: The subject of leaks was a great preoccupation, and it was frequently discussed, and usually when [50] it was discussed, there were various ideas offered. But I have no specific recollection of any meeting or of any precise measures that were discussed except the general sense of impotence that everybody seemed to have about the problem.

BY MR. SLOCOMBE:

Q Turning now to May 9th, 1969, on page 29 of your answers, you say "Before I telephoned Mr. Hoover on May 9th, I had discussed the leak with the President, who requested that steps be taken urgently to find the source of the leak."

Did you call President Nixon's attention to the Beecher story, or did he ask you about it?

A I quite frankly don't remember.

Q Did the President say what steps were to be taken?

A No, the President undoubtedly told me to get urgently in touch with Mr. Hoover and ask him to start an investigation.

Q Did he relate his request in any way to the supposed discussion on April 25th at which the decisions which you describe on page 18—

A I quite frankly have no recollection of the precise content of the conversation.

Q Well, did he say, get in touch with Hoover and have [51] him find out, or did he say, you remember we discussed a week ago, ten days ago, and now is the time to take the action that we discussed then?

A Any specific thing I would say now would simply be misleading. My recollection is that he told me to tell Hoover to take all possible steps to find the source, and there had been a previous understanding that the next investigation would include the authority to do wiretapping.

Q But you have no specific recollection of any—of the President relating that previous decision to what he wanted done on May 9th?

A I have no detailed recollection of the words which the President used.

Q Did you discuss the Beecher story with anyone else prior to the 10:35 call to Mr. Hoover?

A I might have discussed it with General Haig.

Q Was General Haig in Key Biscayne or—

A No, he was in Washington.

Q The next exhibit, which is Plaintiff's H, is Mr. Hoover's memorandum of his first conversation with you on that date.

[52] (The document referred to was marked for identification as Plaintiff's Exhibit H)

But I want to call your attention not to the memorandum itself but to the newspaper story which is attached. In the middle column, the first paragraph, the latter part of that sentence is ". . . small teams of men are permitted

to slip across both the Cambodian and Laotian borders to locate enemy concentrations of men and material," and then the end of the following paragraph: "Each plane, which normally carries about 30 tons of bombs, lays out a pattern that is a thousand feet wide and four miles long." And then the fourth paragraph in that column: "Over the last two weeks more than 5,000 tons of bombs have been dropped by B-52's in this area, according to one estimate."

Did Morton Halperin have access to that level of detail about the bombing?

A I would not remember that today.

Q Did you?

A Did I have? I suppose I had access to it, but that I ever fixed it in my mind numerically I would question.

Q Who would have had access to that kind of detail?

A I would have had access to that kind of detail, [53] General Haig would have.

Q Who would have had working familiarity with that kind of detail?

A Well, Mr. Halperin well might have, based on his previous experience in the Defense Department. But to reconstruct this seven years after the event is simply impossible.

Q Would not people in the Air Staff have had intimate familiarity with that kind of detail?

A I would assume so, but that is purely speculative.

Q Did you at any point in your discussions with Mr. Hoover suggest that the technical detail that was included within the article might offer a lead as to the source of the story?

A I doubt it seriously.

Q The next exhibit is I, and it is a 505 memorandum of conversation between you and Mr. Hoover, and we have included, as well as the page we have been given, another version of the first page, which comes from a House Judiciary Committee document, because it supplies the big omission in the middle of the first page that you see, the first page in the version that has been supplied to us.

[54] (The document referred to was marked for identification as Plaintiff's Exhibit I)

A Which one do you want me to read, the cover sheet?

Q It is not a cover sheet. The second page is a fuller version of the first page that has been provided to us, full version of the same page.

A The second page?

Q Yes.

A Yes, that one I have seen. What is the question?

Q In your response to Mr. Hoover's list of possible leakers, did you make any reference to the people who

would have had access to the specific material in the Beecher article?

A Are you talking about page 2 now?

Q I am talking about your reaction to Mr. Hoover in this conversation reports that he identified to you a number of people who might, on the basis of everything ranging from their roommates to their Kennedy philosophy, be the source of the story.

Did you at any point in this conversation raise the question of who had access to the specific information contained in the leak, about the bomb path?

[55] A With Mr. Hoover?

Q With Mr. Hoover.

A I did not tell Mr. Hoover how to conduct his investigation. I asked him to conduct an investigation. My responsibility was to identify those people who were on the National Security Council staff or who worked closely with the National Security Council in other agencies, not to run his investigation for him.

Q Did you relate this investigation—in your conversation with Mr. Hoover, did you relate this investigation to the prior decision which you say was made on April 25th to tap four specific people in connection with the next investigation or wiretap?

A The four people were identified as being eligible for wiretapping. When exactly that would happen was left vague. In my mind, I assumed that the investigation of this particular case would be subject to the authorization that was given at that prior meeting, yes.

Q Did Mr. Hoover give you any reason to understand that in fact he had ordered a wiretap of Morton Halperin?

A No.

Q Do you have any explanation of why Mr. Hoover and you had this conversation which discussed suspects of a major [56] leak, including Morton Halperin, on this speculative basis, if Mr. Hoover had instructions from the President to tap four people, including Mr. Halperin?

A This investigation did not concern a wiretap order. This was Mr. Hoover's reply to my request to conduct an urgent investigation, and to let me know as soon as possible what his investigation turned up. This memorandum points out that he identifies Mr. Halperin as a likely suspect, and it stresses the fact that I had often heard this, that my reply was that I had often heard this and had not ever seen any evidence with respect to it.

So the second page, "Dr. Kissinger said he has heard this as speculation, too, but there is no proof." So it is in the context of Mr. Hoover responding to my request on behalf of the President for a full investigation.

Q The allegation that is referred to, is it not that Beecher had, undergraduate school, had a roommate who was now a staff member of the National Security Council.

Was it your understanding that that was Morton Halperin?

A That's right.

Q He goes on to say "There is a strong possibility he may have gotten some of his information from the Southeast [57] Asia desk," and he then refers to systems analysis. He then says "The source we have been working through said it should not be ruled out that a staff member of the National Security Council, who obviously was in a position to know the information contained in all three articles, could have assisted Beecher."

Did you understand that to be a specific reference to Halperin?

A That's right.

Q On page 3 of the memorandum, you are reported by Mr. Hoover as having said, "Dr. Kissinger said he appreciated this very much and he hoped I would follow it up as far as we can take it, and they will destroy whoever did this, if we can find him, no matter where he is."

What was meant by that statement?

A Well, first of all, this is Mr. Hoover's recollection of events. What was menat was that we would discharge him.

Q You don't recall using the phrase "destroy whoever did this"?

A No, but it is possible that I used it.

MR. KEUCH: Mr. Slocombe, since you are at a natural break, can I suggest a break for about ten minutes?

[58] THE WITNESS: If there is anything more about this document, let's finish this document.

MR. SLOCOMBE: No, we have finished with this document.

(A recess was taken at 5:35 p.m.)
(On the record at 5:48 p.m.)

BY MR. SLOCOMBE:

Q Turning again, then, to May 9, 1969, Morton Halperin was in Key Biscayne with you on that day, as I understand it.

A Yes, that is my recollection.

Q Did you have a conversation with him about the Beecher leak?

A I can't fix the exact date that I had the conversation, but I had a conversation with him on or about that date.

Q On page 41 of your answer, in discussing this matter, you say "In any event, in May 1969, or soon thereafter, Mr. Halperin was denied access to some of the most sensitive information."

A That is correct.

Q That, then, was a decision to cut back his access prior to the tap being—either prior to the tap being [59] installed or prior to any substantial amount of information being developed from it?

A That is correct.

Q Did you later offer to resume full access in connection with developing a job which would result in his remaining on the staff—developing a job description?

A I frankly don't remember it, but it seems highly probable that I did, because I was very eager to keep Mr. Halperin on my staff.

Q I would like to call attention to page 193 in your testimony. This is Exhibit J and it is page 193 of the Senate hearings called "Dr. Kissinger's role in wiretapping," with an attached page, which is from page 14 of the answers to interrogatories.

(The document referred to was marked for identification as Plaintiff's Exhibit J)

Senator Pell asks "Why were not the people who were involved fired as an example so as to stop them?

"Secretary Kissinger. As a result of this program there were two violations that I remember . . ." And the insert in the deletion that relates to Mr. Halperin is: "In the case of one other person, we gradually separated him from any [60] classified documents job to such a point he felt he wanted to resign, but this was an attempt on my part to minimize the damage to individuals themselves."

The reduction in access was not the result of anything you learned from the wiretap?

A That is correct. I warned Mr. Halperin that he was under suspicion. I don't remember whether I warned him that an investigation was going on, but I certainly must have left him with that impression.

And my attempt was to reconcile my obligation with preserving national security information with my desire to keep Mr. Halperin on the staff and the relationship I had established with him over the years.

Q Did you indicate who it was that suspected him?

A I believe I told him that several of my associates had their doubts about him.

Q Did that include Secretary Rogers and Secretary Laird?

A I would not remember now whether it included Secretary Rogers, but it would certainly have included Secretary Laird.

Q Turning, then, to the next day, May 10, 1969—and these are matters growing out of your answers to [61] interrogatory No. 39, the answer appearing on page 31.

To clarify this business about the initials, at the April 25th meeting, four people were discussed—Halperin, (A), (B) and a fourth person, as designated in your answers to interrogatories.

I take it from your answer on page 31 that on May 10, General Haig took four names to the FBI—Halperin, (A), and (B), referred to on page 18, and another person not previously named, who is referred to as (N), (O) and (P) in the page 31 answer. Is that correct?

A That is correct, a person who had particularly close access to that information.

MR. KEUCH: This might be an appropriate place, Mr. Slocombe, if you have no objection, we did make the check you requested during the break. The Secretary will accept the statements, the representations that had been made to you about (N), (O), (P), and (C) and (D).

BY MR. SLOCOMBE:

Q You say in line 4 of the answer, "I also gave him the four names selected at the Oval Office meeting. I may have talked with General Haig in Key Biscayne, and probably did, telling him that he should get in touch with Sullivan and furnish names as directed by the President."

[62] Does the phrase "as directed by the President" mean the four names referred to in the previous sentence, or does it mean to furnish names according to categories or criteria?

A It means according to the criteria established by the President.

Q So you understood that you or Colonel Haig had the authority to suggest, to send over names different from the four people discussed at the previous meeting?

A In the category of who had access to leaked information.

Q But your judgment, if I understood your previous answer, was it was not simply a question of who had access, but who came into some other category as well.

A If someone had access and fell into some other category, that made it conclusive. If somebody had access

alone, then it depended on the degree to which—well, it depended on the extent of the access. And we would generally, over a period of time, send over several of the names who had had access at the beginning.

Q On this occasion you sent over only four names?

A That is correct.

Q Who on your staff had the most involvement with the Cambodian bombing—and I include Colonel Haig in the [63] possible people to be addressed in your answer?

A I would say Colonel Haig—General Haig now.

Q Yes, General Haig now. And why was he not included if Colonel Pursley was?

MR. KEUCH: "If" is a hypothetical, if General Pursley was.

MR. SLOCOMBE: Yes.

THE WITNESS: Well, first of all, this decision was made not to include General Haig—and I don't know whether it ever occurred to anybody to include him.

BY MR. SLOCOMBE:

Q I understand that he wasn't included. I am asking why he wasn't.

A There was never any specific decision made. I suppose it was thought inconceivable that he could be the source of the leak.

Q But it was thought conceivable—or if it was thought conceivable that Colonel Pursley, who was also a career military officer—and I take it a close aide of Secretary Laird—was eligible for inclusion, was there a different standard being applied? Or what was the standard being applied?

A I don't know whether we should discuss that.

MR. KEUCH: Yes, I think we are going beyond [64] speculation. I think we are again involving ourselves in whether or not a third person was the subject of a surveillance and what the standards were to that particular surveillance and the rest, and, again, we feel that is not relevant to this matter.

BY MR. SLOCOMBE:

Q You said in your Salzburg press conference that three of the four names that were first sent over were hired over the strong objections of all my associates.

Did the existence of the objections in any way relate to their inclusion in the list of the first four?

A No.

Q Now turn to the FBI documentation, with which I am sure you are familiar. First, a note—and this will be Exhibit K—a note from Miss Gunday, Hoover's secretary, dated May 10, 1969; Exhibit L, a memorandum from Mr. Sullivan to Mr. DeLoach, dated May 11, 1969; and M, a memorandum from Mr. Sullivan to Mr. DeLoach, dated May 28, 1969.

(The documents referred to were marked for identification as Plaintiff's Exhibits K, L, and M)

And I want to call your attention to certain phrases in those three documents.

[65] First, in the Gunday memorandum, "They do not want anything in writing," at the bottom of the second paragraph.

In the Sullivan May 11th memorandum, the phrase about the middle of the second paragraph, "He stressed that it is so sensitive that it demands handling on a need-to-know basis with no record maintained. In fact, he said if possible it would even be desirable to have the matter handled without going to the Department."

A Which are you talking about now?

Q We are talking about—it's Exhibit L, and it is the May 11th Sullivan-to-DeLoach memorandum, and I have read the second, the last two sentences.

A I have that.

Q In the second paragraph.

A Well, I think you should ask General Haig about what he meant by these phrases. What I know is that I received documents at irregular intervals, letters that

summed up what the FBI considered relevant national security information on these people.

What they did beyond this, how they handled their internal bookkeeping, I was not involved in.

Q Did you ever tell General Haig to try to arrange for the taps to be conducted and instituted without any [66] written authorization or with no record maintained?

A I doubt that. I am sure he told them to keep the matter very confidential, but I doubt that I instructed him that there should be no records, since the whole procedure was based on occasional reports coming to my office and also to the President's office via Mr. Ehrlichman.

Q You say you doubt. Does that indicate that you don't have an affirmative recollection of not giving such instructions?

A It is incompatible with my understanding of the procedure that was established. I have no recollection of giving such an instruction. Having no such recollection, I cannot now speculate why I don't have such a recollection.

Q For completeness, the May 28th Sullivan memorandum includes the sentence in the middle of the third paragraph, "He further stated he did not want any of the logs sent over to Dr. Kissinger's office, but that he would read it here and have it kept here."

Did you give instructions to Colonel Haig to make those arrangements?

A I had always made clear that I did not want to read any logs, and I did not want to be involved in the operational matters. If the FBI believed that they had information that [67] was relevant to my execution of my duties as National Security Advisor, I felt I had an obligation to have it brought to my attention. But I had no interest in the raw material from which they derived it. And I consistently took the position that I didn't want to see it.

So this is quite compatible with my instructions to General Haig.

Q The next exhibit is Plaintiff's N, which is a letter from Mr. Sullivan to Mr. Hoover.

(The document referred to was marked for identification as Plaintiff's Exhibit N)

Now, in your answers to interrogatories, you said you had no recollection of visiting Mr. Sullivan's office, and you cannot confirm or deny the accuracy of the report.

I want to ask whether you had checked your appointment books and telephone records to see if they confirm or dispute Mr. Sullivan's assertion of a meeting between you and him at 11:45 on May 20th.

MR. KEUCH: Mr. Slocombe, would you have the question that that is—.

MR. SLOCOMBE: Sure, it is on page 37.

MR. KEUCH: Thank you.

MR. SLOCOMBE: 46.

[68] THE WITNESS: I have not personally checked my appointment book. Prior to my testimony, I had my appointment books checked, and they show no such meeting. But in 1969 my records were not kept in any very systematic way until about October of that year.

So I would have to say that the records of my office are inconclusive as to this meeting.

BY MR. SLOCOMBE:

Q Turning back to the names that you sent over, why did you feel obliged to send over Morton Halperin's name, if Mr. Hoover had already raised that as a name and had already authority to institute a wiretap?

A Because I also included him among those who had access—because of the access he had to the information.

Q Did he have operational responsibilities—not operational responsibilities—staff responsibilities for you for the Cambodian bombing?

A No, but Mr. Halperin was either the only or—I think there was one other member on the staff—who had responsibility that cut across various of the specialties. In addition, I had very high regard for Mr. Halperin's abilities, and, therefore, as a general rule, I brought him in on most critical decisions that had to be taken, even thought

none of them [69] fell into his specific operational field of responsibility, which cut across all of the fields.

Q When General Haig sent over the list, did you give him the names and discuss them with him, or did you give him criteria and instruct him to draw up the list?

A Well, I am sure I gave him the four names from the Oval Office meeting.

Q Excuse me, on May 9th or prior to that?

A That I quite frankly do not remember.

Q Go on, I am sorry.

A And I certainly discussed with him what additional names having access to the information and/or having access to the information as part of this should be included on the list.

Q How do you explain the addition of a new name that was not on the April 25th list and the omission of a name that was on the list?

A The omission is explained by the fact that that individual had no governmental responsibilities in any way related to this investigation, or no governmental responsibilities. The addition—he had no governmental responsibilities. The addition of the name was that it was an individual in a peculiar position to know about not only the facts but all the [70] details of the raids.

Q Turning back to the time after the tap was in effect, do you recall ever reading any of the logs—now, by logs I don't mean summary letters addressed to you, but the logs—

A I have no recollection reading any logs, and I doubt—I am practically certain that I never read any.

Q Turning now to what will be our Exhibit O, which is talking points which were prepared for you by General Haig, you say in your answers that you assume that you followed them.

(The document referred to was marked for identification as Plaintiff's Exhibit O)

That is question 48 at the bottom of page 37.

MR. KEUCH: Thank you.

THE WITNESS: That would be logical.

BY MR. SLOCOMBE:

Q Note that the last paragraph, paragraph No. 5, includes a discussion of how long the taps were to continue.

Does your assumption extend to assuming that you had a conversation along those lines with Hoover, that is, in which one of the issues was how long the tap on Mr. [71] Halperin would continue?

A I quite frankly do not remember the conversation that precisely.

Q Do you have any reason to believe that you would not have had—that you would not have had a conversation in those terms with respect to that issue?

A I just have no way of remembering it one way or the other.

Q In the same paragraph, General Haig makes a recommendation as to how long the tap on Halperin should go on. "It should be kept on for at least another two weeks, so that a pattern of innocence can be firmly established."

Was the making of such a recommendation and the suggestion to you that you make it to Hoover within your understanding of your role and the NSC staff's role with respect to the taps?

A No, not as a rule.

Q You did not feel that you could advise on how long the taps should continue?

A I never made a recommendation on how long a tap should continue.

Q You have no recollection of making the statements suggested by—

[72] A Can I clarify the previous question? I thought your previous question was referred to this bracketed part.

Q It does.

A I mean the question which I said I have no way of knowing one way or the other. That I thought referred to the bracketed part.

Q It does.

A All right.

Q Do you have a specific recollection of using any other part of this?

A No. I just wanted to make sure that we all knew what we were talking about.

I think this talking point is useful to indicate a mind set. It is not reliable as to any point that was in fact raised.

Q Does that mind set include the assumption that it would be appropriate for you to make a recommendation as to the duration of the taps?

A I do not recall, and I do not believe I did ever make a recommendation as to the duration of the tap—for a variety of reasons, including the fact that I only got those letters—I never had a complete list of everyone who was being tapped. I only got the letters on those that the FBI [73] believed they had national security information.

And, secondly, after May 1970, I did not get any letters, and therefore I would have had no criteria whatever from which to make a determination.

Q In your answer on page 38, question 48, you say "They,"—that is, the summary letters—"were reviewed by General Haig who would call such of them to my attention as he believed appropriate. Occasionally he would put those he considered significant in my in-basket, and those that arrived there may or may not have been seen by me."

Did you ever give General Haig any instructions as to what it was appropriate to give you or what was significant?

A We had the understanding that those cases that seemed to him to involve security information of some significance should certainly be brought to my attention. One difficulty was that these letters, with our criteria of what constituted a piece of security information, didn't coincide

most of the time with that of the FBI, and therefore very rarely did anything come in that was very signficant.

Q How did the concept of what was security information differ?

A I would think that the FBI would consider comments [74] that were critical of our policy as security information, while I would have considered primarily the use of classified information as constituting security information.

Q Did you ever suggest to anybody, to the FBI or to somebody to convey to the FBI, that the FBI should use different criteria?

A My role in this program was substantially passive. I believe that the FBI had its own methods of conducting investigations, and I received their information. During the course of 1970, I began to feel that there was nothing going on that was really relevant to my duties, and I therefore asked the President repeatedly to separate me from this program, which he finally did in May 1970.

Q I take it, then, that the specific answer to my question is no, that you did not ever convey—

A I did not feel that was my responsibility.

Q And you didn't do it.

A No.

Q The answer to question 51 on page 40, you say "I discussed some of the letters with General Haig, or he would brief me concerning them. I do not recall any discussion with President Nixon concerning particular letters, although there were such discussions."

[75] Does the statement that "there were such discussions" mean that you participated in discussions with President Nixon about particular letters and can't recall the specifics, or that there were discussions that you didn't participate in? Or something else.

A My recollection is that there were occasional—very rarely—discussions based on the letters that came to him from his sources.

Q Do you remember whether any of the discussions referred to in your answer to question 51 related to Morton Halperin?

A I don't remember, but since I was somewhat more sensitized to Mr. Halperin, I don't think they did.

Q One point. Question 61, which appears at the bottom of page 42 and then continues at the top of 43, erroneously refers in the middle of the question—"Did you direct the FBI to terminate the surveillance of Mr. Halperin? Did you in fact on or about September 20th, 1969, direct the FBI to continue the surveillance of Mr. Halperin and Henry Brandon, while discontinuing other surveillances then in effect?"

The reference to September 20th, 1969, should be to June 20th, 1969—that is, based on this document, which is Plaintiff's Exhibit N—P, I am sorry.

[76] (The document referred to was marked for identification as Plaintiff's Exhibit P)

A Yes.

Q My question is whether, looking at this document and having the correct date on it, refreshes your recollection as to whether—

A It says June 20th.

Q The answer, September 20th, is simply a mistake, a typographical error—it should be June 20th. The question is, did you, on or about June 20th, 1969, direct the FBI to continue the surveillance of Mr. Halperin and another person, while discontinuing other surveillances then in effect?

A I have no recollection of this. And the question of continuing surveillance did not appear to me to be in the purview of my office.

Q Do you want to turn, then, to the September 15th, 1969, memorandum, which will be Q, which is a memorandum from Mr. Sullivan to Mr. DeLoach, and I note your answer in the interrogatories that you cannot explain the memorandum—"It is not based on any authorization or instructions given by me."

[77] (The document referred to was marked for identification as Plaintiff's Exhibit Q)

Is it conceivable that Haig would have told Sullivan that you wanted certain wiretaps continued without authority from you to make that statement?

A That, to all practical purposes, is inconceivable to me.

Q Exhibit R is an excerpt from Mr. Mitchell's deposition in which he was asked the question "Does the description in that paragraph"—that is, the September 15 memorandum, Exhibit Q—"of who controlled the continuance of these wiretaps correspond to your understanding at that time, that is, that it was up to Dr. Kissinger to decide when the wiretaps came off?

Answer, page 59—"Yes, I think I would have to answer the question, the way you put it, yes, Dr. Kissinger, having initiated the taps, that it would be his determination as to when they came off, yes."

(The document referred to was marked for identification as Plaintiff's Exhibit R)

Does that correspond to your understanding of your [78] role with respect to the continuation of the taps?

A No. It is also incompatible with the facts in the sense that I now know that there were people being tapped about whom no reports were ever sent to my office. And, secondly, no reports were sent to my office after May 1970. So there was no possible way I could discontinue taps on the basis of any evidence I had.

Q Do I understand your statement about the other taps to be that there were taps where you had sent over names—

A There were taps where I had sent over names about which no reports were sent to my office.

Q Therefore, your—

MR. KEUCH: Could we have a pause just a moment?

(Brief sub rosa conference between the witness and Mr. Keuch)

I was just making sure that the answer was accurately stated.

BY MR. SLOCOMBE:

Q But as to the ones where you were getting reports, which was the case in September of 1969, on Mr. Halperin, did you understand—was your understanding of your role and your responsibility consistent with what Mr. Mitchell said?

A No.

[79] Q Staying in the period of August and September 1969, did you have conversations with Morton Halperin before he left the staff?

A Extensively.

Q And what was the gist of those conversations?

A I thought that Mr. Halperin had done an extraordinary job in writing conceptual pieces about the choices we faced and the perspectives with which we should pursue foreign policy, and I was most anxious to keep Mr. Halperin on the staff. There were major problems of finding a role for him that did not bring him into constant conflict with various other strong-minded individuals on the staff.

And, in the nature of things, his assignment cut across many jurisdictions.

Mr. Halperin thought that the way to avoid this was to make him Deputy. That, for a variety of reasons, did not seem possible to me, so I had extensive conversations with him to see whether I could find a role for him that would enable him to say, short of what he had recommended to me.

Q Did anything which you had learned as a result of the information you were receiving from the wiretaps make you doubt that you wanted him to remain a member of the staff?

A I was aware that keeping him on the staff would [80] present a continuing presentational problem to me. But I

was prepared to take that risk, and I had no information that would make me—on security grounds—make me change my mind about keeping him.

Q So at the time you were discussing his remaining on the staff in the late summer of 1969, at a time when the tap had been on for some months, and you had been receiving reports of it, you had no doubts that it was consistent with maintaining security of information that he should remain on the staff?

A That was my judgment.

Q The disputes about his remaining on the staff had to do with wholly unrelated matters—personality and role?

A The disputes within the staff had to do entirely with personality and role.

Q And the presentational disputes that you referred to had to do with the judgment of other people?

A They were the ones that I had experienced earlier in the year.

Q Just to make it entirely clear on the record, Mr. Halperin did not leave the staff because of anything that came out of a tap?

A That is correct.

[81] Q Our next exhibit is an excerpt from Richard Nixon's deposition, which is Exhibit S.

(The document referred to was marked for identification as Plaintiff's Exhibit S)

On page 87 and 88 of that deposition, beginning on line 9 of page 87, "Needless to say, when Dr.—if at any time Dr. Kissinger, after having evaluated the taps or other surveillance material over a period of time, or because of the problem of leaks having receded in importance, Dr. Kissinger had then reached a conclusion that they were no longer necessary, it would be his obligation to furnish that information to Mr. Hoover, and Mr. Hoover would then take them off.

"I should point out, however, that this is consistent with the way that I understood it and directed that the pro-

gram be set up, that Dr. Kissinger should furnish the names and Mr. Hoover would institute the surveillances and furnish the fruits or results of the surveillances to Dr. Kissinger's office, and that they would be evaluated, and Mr. Hoover, in addition, of course, would recommend additional names if he felt it was necessary or advisable because of his own investigation.

"I think that Mr. Hoover, under these circumstances, [82] therefore, would give very great weight to Dr. Kissinger's recommendation that a tap be removed, just as he would give very great weight to a recommendation that a surveillance be instituted.

"It does not indicate, in my opinion, that Mr. Hoover was simply acting as Dr. Kissinger's agent, because, in the final analysis, the surveillances had to be approved by the Attorney General, and it would be therefore a combined judgment, with that final decision being made by the Attorney General.

"It was Hoover who removed the taps—I mean, they would discontinue the surveillances and issue the order that they be discontinued—rather than Dr. Kissinger."

That presents a somewhat different version of your role, and I ask whether that conforms to your understanding of your role.

A With respect to the institution of the taps, it presents no different picture of the role. With respect to—

Q I meant different from Mr. Mitchell's.

A Different from Mr. Mitchell's. It coincides with my perception with respect to the initiation of the taps. With respect to the termination of the taps, it was never my [83] perception that I had any responsibility for the termination of the taps, since, as I have explained, my relationship to the program was primarily as a consumer, or a passive one. And, moreover, I simply did not have the information, after a certain point, to recommend termination, since I didn't even know who was being tapped.

Q But at least through May of 1970, with respect to Mr. Halperin, and to some extent thereafter, from infor-

mation from Mr. Haldeman and General Haig, you knew something of what was coming out of Mr. Halperin's tap.

A I knew next to nothing after May 1970.

Q Let's limit the question, then, for a moment, to prior to that.

A But I would say I knew nothing after May 1970. Before then, it is conceivable that this is something that fell between the cracks. It was never my perception that I had any responsibility for termination.

Q Did you have a perception as to whose responsibility it was to terminate the taps?

A It was my perception that Mr. Hoover would make this determination on the basis of his investigative experience.

Q Did you understand that you had an obligation to evaluate what was being produced by the taps, insofar as you [84] knew?

A No, and I never did.

Q But you did form a conclusion that the criterion that the FBI was applying were [sic] evidently different from what seemed to you the appropriate criterion?

A I formed the conclusion that most of the letters we received did not include material that seemed to me to jeopardize the classified information that I had responsibility for. And in that sense our criteria were different.

Q Did it ever occur to you that they included information which it was inappropriate to be obtaining by means of a wiretap justified on national security grounds?

A The letters that I received were on the borderline, and I could see how people with police but not national security experience might construe them as national security information.

Q Did you have any sense that if you were receiving information that was on the borderline and the tap had been on for some time, it was appropriate to see if it could be discontinued?

A If this program had been my principal responsibility, if I had paid great attention to it, that might well have occurred to me. As it was, I chose the role of asking the [85] President to dissociate me from it, so that people who were in a better position to evaluate its significance and could do something about it would receive the material.

Q When Mr. Halperin left the staff in September of 1969, did any question arise in your mind as to whether it was appropriate to continue the tap after he had left the NSC?

A You have to remember that these taps have assumed an all-consuming importance, to some people at least. At that time, to me they were an occasional letter that wandered across my desk among hundreds of documents, and that, as far as I was concerned, I would glance at the letter to judge whether there was anything significant in it and throw it into my out-basket.

So the answer to your question is, I did not address the question.

Q Well, when you glanced at letters after September of 1969 relating to Morton Halperin, did it occur to you that it was no longer appropriate to have a wiretap on him after he had left the staff?

MR. KEUCH: I think I would have to ask that that be a two-part question. I think you have got to establish first that there were letters that Dr. Kissinger remembers on Mr. [86] Halperin after that period.

BY MR. SLOCOMBE:

Q Were you aware from any source, after September 1969, that the tap was still in effect on the Halperins' home telephone?

A It is probable that I was, but I have no precise recollection of it. How many letters I saw, if any, that I would not remember too well.

Q On the basis of that answer, then—on those occasions when you became aware that the tap was still on, did it occur to you?

A I had the perception that the problem of security was primarily within the province of the FBI, and that it was my primary responsibility to act on information produced by the FBI. Mr. Halperin was still a consultant, he had had access to a broad range of extremely sensitive information, and insofar as I thought about the problem at all I would have thought about it in those categories.

Q You have, I take it, reviewed at various times the full file of summary letters relating to Mr. Halperin?

A Yes, but not for quite a while now.

Q I don't have prepared multiple copies of the exhibit, but I show you a letter dated October 24, 1969. This is [87] Plaintiff's Exhibit T.

(The document referred to was marked for identification as Plaintiff's Exhibit T)

And I call your attention to the initials in the upper righthand corner. I take it those are your initials? That's the format of your initials that you use?

A I don't want to make an issue of this. They don't look to me like mine. They look to me like a staff member having put them on. My initials are somewhat bolder. Let me read the letter.

And I want to make clear that the fact that there is no "HK" on the letter, or an ambiguous "HK," does not mean I didn't see it. The way I would do it is like this, and that would be conclusive. You showed me an earlier document which clearly had been read by me. This, I would think, is not my mark, but that does not mean that I did not see the letter, because I could have just glanced at it and thrown it in my out-basket. Now let me read it.

(Paper with witness's initials was marked for identification as Plaintiff's Exhibit U)

I just have no recollection of this letter. That [88] doesn't mean I didn't read it at the time. Nor does it mean that I did. I just have no recollection.

Q Did you form a conclusion as to whether the information that was being obtained from the tap was compatible and consistent with its original purpose?

A I thought it was on the borderline.

Q In a press conference which you gave on May 12, 1973, which will be Plaintiff's Exhibit V—

A May I see it?

(The document referred to was marked for identification as Plaintiff's Exhibit V)

Q Sure. At the bottom of the second page, which is page 7 of the transcript—"I would like to add, in fairness to the individual concerned, that I never received any information that cast doubt on his loyalty and discretion, and that the individual concerned left my staff for reasons that were wholly unconnected with any security investigations that may have been conducted. That is all I will say on that subject."

I take it that is still your view?

A I volunteered this information in order to be helpful to a former associate, and it is still my view.

[89] Q On page 36 of your answers in response to our question 45, you said that after May of 1970, when the summary letters were no longer being sent directly to you, "Mr. Sullivan, I understand, would call up General Haig if he had information of sufficient gravity. It is possible that General Haig informed me of such calls on one or two occasions."

Do you recall whether any of those occasions related to Morton Halperin?

A I remember only one occasion, and that did not relate to Morton Halperin. And I don't recall any that related to Morton Halperin.

Q In the previous paragraph it says "After that transfer occurred, although I do not recall with particularity any conversations between Mr. Haldeman and myself regarding the wiretap program, he may occasionally have brought to my attention matters which he considered relevant to the NSC staff."

Do you recall whether any of those matters related to Morton Halperin?

A I am certain they did not.

Q Who, to your knowledge, knew of the wiretaps other than the defendants in this case and the FBI people who were directly involved in the operation of the taps? In other words, [90] who else on the White House staff?

Let's begin with who on your staff knew it.

A On my staff, the people who organizationally knew about it were General Haig. I would find it impossible to believe that the people in my outer office—my office was set up so that the adjoining office had a desk for General Haig and a desk for another assistant, who was first Mr. Eagleburger and then Mr. Lake.

I have no way of knowing whether they knew about it, but given the flow of papers in and out of my office, it would have required a heroic management effort for them not to see these letters come through.

And then my secretary probably knew. Outside of that, I don't think anybody in my office knew.

Q Do you know whether David Young knew?

A David Young. It would depend on the time he was on my—

Q He was there at least from some time mid-1969 or early 1970 through the balance of that year, which includes the period of time when the Halperin wiretap was in effect.

A He might have known.

Q You never told him?

A I don't remember that I ever told him. He was [91] from January 1970 to January '71, David Young, my appointment secretary. Did he know? He was not physically located—when my office was in the basement, my appointment secretary was not located in the same proximity as he later was. And therefore I am not sure that David Young would have known about it.

Q Did Nelson Rockefeller know, as far as you know?

A Certainly not.

Q Did Richard Coyne, who was connected with the President's Foreign Intelligence Advisory Board?

A Certainly not from me. I barely know him. Nelson Rockefeller might have learned about it after the event.

Q After—

A I mean, after this whole story became public. Well, I mean, certainly.

Q Everybody knew by then, but prior—

A He did not learn from me while the taps were going on.

Q On page 9 of your answers, the answer to question 8, you state "To refresh my recollection in answering questions 1 through 7B, I have consulted my testimony on the subject of wiretapping on several occasions before the Senate Foreign Relations Committee, and documents furnished to me in connection with that testimony."

[92] What are those documents?

A The same documents you have been showing me.

Q All of those documents have been made available to us that you consulted in connection with preparation, other than those which relate to other people?

A I will have to ask my lawyers.

MR. KEUCH: Yes, I will state for the record that we have been working with the Secretary's staff trying to exhaust every document that he was using, and have tried to comply as fully as we can within the range of human perfection.

BY MR. SLOCOMBE:

Q Does the appointment book which you refer to—I think it is the very last answer—71A on page 46, next-to-the-last answer—that appointment book presumably covers April 25, 1969.

A Well, I have explained to you that between—from January until October, my records were very sporadic, and cover no internal appointments at all. They only covered people who came in—or substantially people who came in from the outside to see me.

From October 1970 on, we kept a detailed log that would account for practically all of my day. And, therefore, [93] for that precise period, my own records are very inconclusive.

Q I would still request that the April 25th, 1969, appointment book be made available to us under the same rules as the others have, that is, with everybody blocked out except the parties and Mr. Hoover.

MR. KEUCH: If we can find any such document for that date, we will supply it.

MR. SLOCOMBE: Our next exhibit is Plaintiff's W.

(The document referred to was marked for identification as Plaintiff's Exhibit W)

BY MR. SLOCOMBE:

Q I take it that in the period that we are talking about, that is, January 1969 through February of 1971, you did not—did you cause any recordings or monitoring to be made of your telephone conversations that produced a written record?

A I don't remember—the reason taping was instituted of telephone conversations—I don't remember when it was, that it was instituted. It was a technical device, because too much of the time of the secretaries during the day was consumed in listening to the conversations. The tapes were then [94] transcribed in the evening and destroyed that same evening. No tapes were ever kept.

Q You say in your answers that they were monitored by personal secretaries and records prepared.

A I would suppose during that period that was the case.

Q Someone just sat and listened.

A Someone sat and listened and took shorthand.

Q Have you searched yourself or caused a search to be made through those monitored records for references to the wiretap program, and specifically the wiretap on Morton Halperin?

A Yes, and I haven't found anything.

Q Who conducted that search?

A Mr. Eagleburger. I have never looked at these records.

Q Mr. Eagleburger actually read through the transcripts of the telephone conversations?

A To the best of my knowledge, for the questions that you asked in the interrogatories.

Q Did he also read through the transcripts to see if there was any information in those transcripts relating to matters relevant to this case?

[95] A I am not sure, we would have to ask him.

Q I want to request that that be done, because I think that that is a matter which is within the scope of our Rule 34 request of records relating, a search of records relating to—

MR. KEUCH: We will consider that request, Mr. Slocombe, and respond to you as soon as we can.

BY MR. SLOCOMBE:

Q Our final exhibit is Plaintiff's W, which is an article from the New Republic by John Osborne, and I call your attention to the paragraph on—

A What's the date?

Q January—February 14, 1976. I call your attention to page 9, the righthand column, about halfway down the continuation paragraph, where it says "It was in private communication with journalists that Kissinger got himself into trouble and generated a doubt, usually reflected rather than explicitly stated in print and in broadcast, about his believability. In two examples drawn from my experience. . ."

A Wait a minute, where are you now?

Q Page 9, the righthand paragraph, about the middle of the first paragraph, at the top of the page.

MR. KEUCH: We have it.

[96] BY MR. SLOCOMBE:

Q To continue, "In two examples drawn from my experience, he at one point came close to passing the whole buck to his faithful assistant, General Haig, and in another instance suggested that he had tolerated—he never, to my knowledge, said he initiated—the tap on Morton Halperin in the hopes that it might convince Bob Haldeman and John Ehrlichman and other White House doubters that Halperin wasn't the security risk that they said they thought he was."

Did you ever have a conversation in those terms with John Osborne or anyone else?

A I called Mr. Osborne, in fact, after this article appeared, and pointed out to him that this must have been based on a misunderstanding. I, of course, hoped, for the reasons which I have described, that the wiretap would exonerate Mr. Halperin, but the initiation of the wiretap was not as a device in order to exonerate Mr. Halperin.

Q And, therefore, did you have conversations along those lines with Mr. Osborne, which you think he misinterpreted?

A I have no recollection of such conversations, and I called him up as soon as I read that article to point out to him that it must have been based on a misunderstanding. I am [97] sure he can confirm this.

Q So the views attributed to you in the article are not in fact your views?

A No, the views that others have given.

Q Referring to your statement about exoneration, is it your judgment that the taps did in fact produce any information suggesting that Mr. Halperin was responsible for any of the leaks which were the subject of concern in early 1969? Or any other leak?

A No.

MR. SLOCOMBE: I have no other questions. Wait, excuse me.

BY MR. SLOCOMBE:

Q Just for the record, how did you become aware that the tap was terminated in February 1971. I mean, it was terminated in Feburary 1971—how did you become aware of that?

A I am actually not sure that I was ever formally notified that the taps were terminated. At some later period I was told that all tapping in the government had been turned off—of this kind.

But I don't remember when that was.

Q Did you and General Haig have any conversation in February of 1971 about terminating the Halperin tap?

[98] A No.

Q Did you subsequently, in any context, learn of any use that was made of the information which had been developed from the wiretap? And I refer specifically to the investigation of the Pentagon papers leak.

A No.

Q Did you know that David Young had access to at least one summary letter in the course of that investigation?

A I didn't know in fact that David Young was conducting the Pentagon papers investigation, and I didn't know what material he had access to.

MR. SLOCOMBE: That's all.

MR. KEUCH: We have no questions. Any of the gentlemen for other defendants?

MR. SCHEARTZ: We have no questions.

MR. KELLERHER: No. questions.

MR. KEUCH: All right.

MR. SLOCOMBE: Thank you very much, Mr. Secretary.

(Whereupon, at 6:50 p.m., the taking of the deposition concluded.)

[99] I have read the foregoing 98 pages, which contain a correct transcript of the answers made by me to the questions therein recorded.

/s/ _____
HENRY A. KISSINGER

Subscribed and sworn to before me this ____ day of ____, 1976.

_____
Notary public in and for:

My commission expires:

CERTIFICATE OF NOTARY PUBLIC

I, Terry Barham, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

/s/ _____
TERRY BARHAM
Notary public in and for the
District of Columbia

My commission expires May 14, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS,

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS.

Deposition of H. R. HALDEMAN, taken on behalf of Plaintiffs at the ACLU Foundation, 633 South Shatto Place, Los Angeles, California, commencing at 10:00 a.m., Friday, January 16, 1976.

Reported by:
SALLY YERGER, CSR, # 2008
Notary Public

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[5] H. R. HALDEMAN

having been first duly sworn, was examined and testified as follows:

MR. SLOCOMBE: First of all, just for the record, this deposition is taken pursuant to Notice. We do appreciate your courtesy in moving it up a day, which I think accomodates all of our schedules.

THE WITNESS: Glad to do it.

EXAMINATION

BY MR. SLOCOMBE:

Q In the period before May 9, 1969, were you present at any discussions of wire tapping?

A Not that I recall, no.

Q Were you present at any discussions of leaks and measures to detect the source of leaks?

A I can't recall any specific discussions. But I am sure that in that period of time I was present during discussions of the problem of leaks because that was a matter of major concern to the White House and was the subject of frequent discussion.

Q The question of the use of various investigative techniques as distinguished from the problem of leaks, did that come up in the discussions at which you were present?

A Now you are still in—

Q Pre-May, 1969, the first few months of the administration.

[6] A Again, I don't recall any specific discussion at which techniques were raised. I don't have any recollection in a general sense of the discussion of techniques at that time. The reason I am hesitating is that I do have very definite recollection of discussions and instructions to me to use the techniques of lie detector tests as a process of smoking out leaks or sources of leaks. I can't tell you for sure that that took place before or after May 9.

Q But that was in 1969?

A I would think so, yes. I am sure it was. I am sure they were. There were several instances where the use of lie detectors arose.

Q Who was present at these conversations?

A Again, I can't give you a specific conversation. My recollection is that it would be the president. I don't have any specific recollection that anyone else was present in those discussions.

MR. CHRISTENBURY: Excuse me, Mr. Slocombe. I understand your general line of questions. I think that certain background questions are both necessary and proper.

MR. SLOCOMBE: If I could ask my next question, I may anticipate your objection.

MR. CHRISTENBURY: Very well.

Q BY MR. SLOCOMBE: Do you remember whether those conversations in which there was a discussion of lie detectors or of polygraphs, did they relate to leaks in the early months of the administration out of the National Security Council machinery?

[7] MR. CHRISTENBURY: I don't believe that that fully satisfies my problem. That is simply that this is a suit involving wire tapping and that technique only. I am not sure I perceive the relevancy of the other techniques that may or may not have been considered or even used.

MR. SLOCOMBE: May I ask? On the whole, I agree with you. I am trying to get the record clear on this issue.

Q In those discussions in which polygraphing came up, do you have any recollection of wire tapping also being discussed?

MR. CHRISTENBURY: Fine. You may answer.

THE WITNESS: No.

Q BY MR. SLOCOMBE: When did you first hear of Morton Halperin?

A With no disrespect, it is an unpleasant question. With no disrespect, I can't really tell you. I am sure I

must have heard his name along with names of other people that were close associates of Dr. Kissinger's in the early days of the administration.

But as I say, with all due respect, it was not a name that meant anything to me. Dr. Halperin's distinction is in a field that is not my field.

Q Do you have any specific recollections of any conversations in the early days of the administration, including indeed, the period just before the inauguration in January of 1969, about the hiring of Dr. Halperin?

A I have no recollection specifically about the hiring of Dr. Halperin. There were of course, extensive [8] discussions about the process of building the staff in the White House and of individuals. It is quite possible that Mr. Halperin's name arose in those discussions. But, it just didn't mean anything to me in any significant way. I don't have any recollection of that name as contrasted to others.

Q What was the general character of those discussions?

MR. CHRISTENBURY: Again, excuse me. I have problems. Having had no recollection of having discussions about Dr. Halperin, I don't know that discussions relating to others or general discussions would be relevant.

MR. SLOCOMBE: Mr. Haldeman indicated he was present at discussions of filling Dr. Kissinger's staff, at which it was possible.

MR. CHRISTENBURY: I don't know he said Dr. Kissinger's staff. I think he referred to employment generally.

Q BY MR. SLOCOMBE: Did those discussions include discussions of the hiring of people for Dr. Kissinger's staff?

A At that time I am sure they did, yes.

MR. SLOCOMBE: With that clarification, I think we are talking about some discussions at which people to be hired for Dr. Kissinger's staff were discussed. These discussions took place. I think I would like to probe more to find out what the character of those discussions were. This

among other things, might help refresh Mr. Haldeman's recollection as to what happened in those meetings.

MR. CHRISTENBURY: I would limit it in that respect. I am troubled by the line of questioning. But we do want [9] Mr. Haldeman to be as responsive as he can.

I think that certainly any discussions that would identify other persons by name are totally inappropriate. We will let him respond just in a very narrow sense to your questions.

MR. SLOCOMBE: I have no interest in any other names in this part of the question.

Q The question essentially is, in those parts of the conversation which related to Dr. Kissinger's staff, what was the general tenor of that discussion?

A That is very hard to characterize because you are talking about a period where there were constant, ongoing discussions of all the matters of putting a White House staff together and forming a new government, in effect.

We were all just starting out. The range of discussions covered every possible aspect of the recruitment and evaluation and clearance and hiring process.

Q Did you ever personally—I assume you know the answer. Did you ever personally recommend against the hiring of Dr. Halperin?

A No. I don't believe so. Certainly not specifically by name because as I said, I didn't know the name.

Q Were you present at any discussions at which anybody recommend against the hiring of Dr. Halperin?

A Not that I recall, no.

Q Were you ever present at a discussion at which Dr. Kissinger said that Dr. Halperin was a holdover from the prior administration that he would like to get rid of?

[10] A I don't recall that. I do recall the general subject as one of the matters under discussion, of the question of retaining or rehiring holdovers from the previous administration. That was one matter under consideration in the whole range of matters regarding employment.

Q What was the gist of that discussion?

A Just the question as to viability and that was not limited to Dr. Kissinger's staff. This covered the hiring process all the way across the board.

Q But this was a general discussion of how many people on the staff he wanted to have who had been working for the previous administration?

A No. You are going beyond what I said. I am not sure what you said because I stepped in too fast to interrupt you.

MR. CHRISTENBURY: Let me interpose a troubling aspect of this that I perceive. That is again, we want you to get the background that is necessary. But the general discussions as to hiring—the record, as you certainly are aware of as to why the electronic surveillance was utilized and the sum and total of the testimony did not go to the question of his prior activities or prior representation, other than in his personnel file.

MR. SLOCOMBE: We have not yet taken Dr. Kissinger's oral deposition. But he did say in Salzburg that all of his closest associates recommended against hiring Dr. Halperin. We have yet to find anyone who did, except Senator Goldwater. But I think we are entitled to find out who those close associates [11] were. If Mr. Haldeman was not one, that is fine. I think we have established that. So, I am prepared to move on to something else.

MR. CHRISTENBURY: Fine, I am sorry.

Q BY MR. SLOCOMBE: Did you recommend to Dr. Kissinger not to hire holdovers or Democrats or liberals or people who worked for the Kennedy/Johnson Administration in general, as opposed to a specific recommendation against Dr. Halperin?

MR. CHRISTENBURY: I would instruct him not to answer. I simply don't see the relevancy. I think that any recommendation that he had as to Dr. Halperin, you have probed that.

Q BY MR. SLOCOMBE: If I understand your prior answers then, you were not present at any discussions

prior to May 9, 1969 at which wire tapping for the purpose of detecting the sources of leaks was discussed?

A Not that I recall, no.

Q Just specifically, were you present at any meeting with J. Edgar Hoover at which subjects in the area of detecting leaks were discussed?

A Again in that time, I can't pin that down. I am sure that at conversations at some times at which Director Hoover was present, the discussion did cover the subject of leaks. But I can't confirm that. That would have been before the May date.

Q With Attorney General Mitchell?

A The same.

[12] Q With Dr. Kissinger?

A Let's see—what was the nature of your question? Give me the specific question regarding Dr. Kissinger.

Q Were you present at any meetings or discussions of any kind or encounter including telephone conversations with Dr. Kissinger at which the general subject of detecting leaks from the national security information was discussed in this period?

A I think probably so.

Q Can you give us your best recollection of those discussions?

A No, other than the general sense I have already given you. That was a concern. So I believe there was discussion about the problem of how to deal with it.

Q But you have no specific recollection of the substance of this?

A No I don't.

Q Do you have any recollection of a meeting which is alleged to have taken place April 25, 1969 among J. Edgar Hoover, Attorney General Mitchell and President Nixon which began in the Oval Office and into which Mr. Kissinger was allegedly summoned? Then Hoover, Mitchell and the President went to Camp David. Do you have any recollection of such a meeting?

A That is really not a meeting, but a series of meetings in a sense.

I have no recollection of the Oval Office [13] meeting. If that is a weekend, that I do recall.

In the first place if that is a weekend, if it is a Friday—

Q Yes, it appears to be a Friday.

A I suspect that that is the weekend that the President had Director Hoover and Clyde Tolson and the Attorney General as guests at Camp David overnight. If that is the case, I was with them on the trip to Camp David. We went up by helicopter from the White House and had dinner at Camp David and spent the night. I think we spent the weekend. I think however that Tolson and the others went back down on Saturday.

Q And Mitchell was present on the helicopter ride?

A That is my recollection. If this is the weekend I am thinking of and I am not sure of it. I remember a weekend at Camp David in the early days of the administration when Hoover, Tolson and Mitchell were the President's guests at Camp David. I remember it individually because a very amusing incident took place during the showing of a movie.

Q In any of the conversations in which you participated or overheard, was there any discussion of wire tapping for the purpose of detecting leaks?

A Not that I recall at all. I have no recollection of any substantive discussion during that weekend and that is the time I am focusing on, the weekend when we were at Camp David.

Q I take it that if there was a meeting among the people who later went up to Camp David and Dr. Kissinger in the Oval Office before that, you weren't present at it?

[14] A I have no recollection of being present at such a meeting and don't believe I was.

Q Would the White House logs for that period show clearly who was with the President in the Oval Office?

A Within the limits of human accuracy to maintain the logs, yes. I mean purportedly, they would hopefully show it.

Q The system was supposed to work that if Dr. Kissinger were summoned into a meeting that was already in progress, someone would make a note that he had gone in?

A Right, also if I were. Actually, my going in and out of meetings could be less accurately recorded than Dr. Kissinger. If Dr. Kissinger were there, it is most likely that that would show in the log.

Q Do you recall an interview that you gave—let me go back one step. Is it possible that Mitchell was not on the helicopter ride to Camp David, but went up separately and met the President and you and Hoover and Tolson there? Do you remember him going on the helicopter?

A No, I don't remember him being on the helicopter. I should backtrack. I can't confirm to you—I was going on the assumption and I can't confirm it that any of us went up by helicopter. That was the normal means of going to Camp David. Now that you have raised that specific question, my recollection is that Hoover and Tolson came up by car.

Q Hoover and Tolson went up by car?

A Separately, not with the President. Hoover went up in his own car.

[15] Q From the White House?

A You are trying to tie my recollection of Camp David in with my nonrecollection of a meeting in the Oval Office. I can't do that.

Q Would the White House records show who was with the President when he was in a helicopter or a car?

A Yes, they should.

Q So the White House records should show how the President got there and who was with him?

A Right. Specifically, the helicopter log record would be highly accurate. It would be highly unlikely that it would not be complete.

Q Did you in this period form a judgment as to the legality of wire taps for the purposes of detecting national security leaks?

MR. CHRISTENBURY: Mr. Slocombe, I would have to object at this point. I don't think the witness has testified that he had any recollection of any meetings where the subject of wire tapping was discussed.

MR. SLOCOMBE: I will rephrase the question until the first time he indicated an awareness of wire tapping.

MR. CHRISTENBURY: We can focus on it at that point.

Q BY MR. SLOCOMBE: When did you first become aware that a wire tap had in fact, been installed on Dr. Halperin's telephone?

A I have not the vaguest idea.

Q Did you become aware of a program of wire taps for that purpose which was allegedly authorized by the [16] President in the period of late April and early May of 1969?

A I can't put—to use John Dean's word—specificity of dates on that. But I did somewhere in that period become aware that there was in effect a program of wire tapping certain individuals in connection with trying to detect leak sources, yes.

Q You understood the purpose of the tap was to detect the sources of leaks of national security information?

A Right.

Q Did you form an opinion as to the legality of that program?

A No. I was not called upon to form an opinion. I am not a lawyer. I didn't make the practice of forming opinions of the legality of any ongoing activity.

Q Did you have any understanding of the procedures to be followed in that wire tapping? For example, were you aware that the regular FBI procedures for such things as records on renewal requests were not to be followed?

A The tense of your question presumes a knowledge of the program before it was put in, which I don't believe I have. So my answer would be no.

Q When you learned the program was ongoing, did you learn anything about the procedures that were going to be used in the program that was in operation?

A Your tense is still wrong. You say "were going to be used." When I learned about it, they were being used.

Q I stand corrected.

A And the answer would still be no in the sense [17] that I had no involvement in the procedures.

Q But did you know anything about them?

A I don't think so. I only knew that there were taps being made on certain individuals for this purpose.

Q Did you inform Mr. Ehrlichman of the existence of this program?

A Not that I recall.

Q Do you remember any discussions in this general time period with Mr. Ehrlichman about wire taps?

A Only in a very general sense that my general recollection now is that Ehrlichman was aware that this program was under way, as I was.

I don't know that I told him or he told me or that we both heard from someone else. I can't pinpoint a source.

Q Do you recall any discussion of how long the tap program was to continue, how long any individual tap was to stay on?

A No.

Q Were you aware of any instructions by the President that the tap program was to be as brief as possible?

A No.

Q Were you aware of any instructions by the President that there was to be a limitation on the overhearings in the tap as to what was relevant?

MR. CHRISTENBURY: Excuse me. What do you mean by "limitations?"

MR. SLOCOMBE: Limitations as to overhearings. That is, as to what was overheard and recorded in the course of the [18] operation of the wire taps, whether it was to be limited to what was pertinent to leaks in the detection of the sources of leaks.

MR. CHRISTENBURY: Okay.

Q BY MR. SLOCOMBE: Were you aware of any such instructions?

A No. I should generalize my answer. I was not aware of any of the procedures of instructions or restrictions or expectations of the program at all, simply of the fact of its existence.

Q Do you have any recollection of how you came to be aware of the program?

A No. I just testified—my best recollection is that it was on the occasion of some fact that had been determined by one of the taps that was brought to my attention.

Q There is testimony in the record that letters were prepared. We have the letters that were prepared and addressed to President Nixon which were delivered to Mr. Ehrlichman by General Haig. That is, that the FBI would prepare a letter addressed to the President signed by J. Edgar Hoover, which would actually be delivered to Colonel Haig. He would then take it to Mr. Ehrlichman's office and Mr. Ehrlichman or people on his staff would make a further disposition of it.

Were you ever contacted by Colonel Haig about that procedure?

A Not that I recall, no. I don't think I knew of that procedure.

Q Did your responsibilities in the White House [19] include a general control of the flow of paper?

A General control, yes.

Q What was the normal procedure with respect to letters addressed to the President from J. Edgar Hoover?

A I am not sure there was a normal procedure.

Q Is it impossible to generalize about how?

Let's go back to the more general statement. What was the general procedure with respect to letters from senior government officials addressed to the President?

A They would normally be—even then, subject to the limitation of the dangers of generalization, let me say that they would—the normal procedure was that such a letter would be directed to the White House staff, senior White House staff official responsible for the area covered in the letter. That would be done by the staff secretary.

Q Who was that?

A At that time it was probably John Brown. I can't confirm that. But I think that is right. The individual really doesn't make any difference. It is an institution. The staff secretariat was an apparatus for handling the orderly flow of paper in and out of the President's office.

Such a letter would be directed to the senior staff person responsible for that area.

Q Having been opened first by someone in the staff secretariat?

A I am not sure. I don't know whether the letters were opened to begin with. But it doesn't make any difference. It was a clerical process. They were opened at or before they [20] got to the staff secretary.

Q What was done with letters which were considered as sufficiently sensitive—I take it that there were letters that were sensitive that should not have been opened in the normal paper flow of government mail?

A Right, there were. That is why the generalization problem was difficult because it becomes even more difficult to generalize as to what happened with sensitive material because it depends on how it was identified and how it was routed.

There were a number of routes for sensitive material to reach the President and any particular sensitive item could have reached him through any one of a number of routes.

It could have gone to the staff secretary in the normal routine, but been identified on the cover as highly sensi-

tive in some way and if it clerically fell within national security's area, it would be delivered unopened to the NSC apparatus, which had its own secretariat which processed its own incoming materials.

It might have gone directly there without coming to the staff secretary. Most likely it would if it were the NSC bailiwick.

Material from Director Hoover could well have gone to the President through that route, or through the White House Counsel's office (At that time it was John Ehrlichman) or through my office directly or through Rosemary Woods' office (who was the personal secretary to the President and who [21] was a route for sensitive material to the President).

There were a number of possible routes. I have cited examples. I cannot give a definitive list. You can probably raise some other suggestions.

Q Were you normally aware of how these various routing systems worked? That is, normally would you know if letters from a cabinet officer which were regarded as sensitive, were going through one of those sensitive channels? Were you generally aware of that?

A Normally and generally are dangerous words.

Q I understand that.

A In a one-word answer, I would say yes. But I would want to qualify it. While normally or generally I would be aware of it, it was quite possible and I am sure as a matter of fact, that there were instances of such routing of which I was not aware.

Q I take it that you personally or your office did not during this period, receive any summary letters addressed to the President and signed by J. Edgar Hoover relating to Dr. Halperin's tap?

A None that I can recall.

Q Were you aware that they were being delivered to Mr. Ehrlichman?

A I don't believe so.

Q Did you have any discussion with Mr. Ehrlichman about the procedure whereby they were delivered to him or whereby a procedure would be set up?

A If there was such, I couldn't have discussed it.

[22] Q A fortiori, you did not refer the letters to him or set up the procedure and tell him that he was to be the mail box for those letters?

A If you drop the Latin prelude which I don't understand—if I don't include that in my response, I will say yes. I was not aware.

Q Since all that was true, the other follows.

You had no such conversations with Tolson, Haig or Dr. Kissinger?

A About the procedure? I don't believe so.

Q About the procedure for delivering the mails addressed to the President?

A I don't think so. Let me point out, which may be helpful in looking at this whole thing as you are trying to analyze it, you are talking about a time when the administration was in its infancy and our systems and procedures were just being developed and were just shaking down. So a lot of things that I remember as normal procedure or that you have heard about in a lot of press coverage and a lot of these things that came to be accepted as normal procedure in the later years or even later months of that year, might not well have been in place at the time that we are talking about. Now in 1969, we were developing systems and shaking them down and revising them.

Q I want to be clear that the procedure we are describing continued so far as we understand, through May of 1970. My question applies on a continuing basis up through May of 1970. You were not aware that letters were being delivered to Haig first by courier and then to Ehrlichman's [23] office addressed to the President?

A Not of that specific routing, no. I was aware that there were reports of wire tap findings coming. It was my understanding they were coming to Kissinger's office primarily.

Q This is the same state of awareness that we talked about before?

A Yes, right.

Q Did you see any of those reports prior to May of 1970?

A Yes, I think I did.

Q How many?

A I am not sure, several.

Q How did they come to you?

A Either from Dr. Kissinger or Colonel Haig.

Q Can you describe the reports which you saw?

MR. CHRISTENBURY: Excuse me. Your question may not enlist it, but to get our standing objection on the record, we wouldn't permit Mr. Haldeman to testify in general terms.

MR. SLOCOMBE: I am getting to that. I know the objection. I would like to withdraw the question. I will rephrase it.

MR. CHRISTENBURY: Very well.

Q BY MR. SLOCOMBE: Without describing the contents of any letters other than those which reported on Dr. Halperin or from his telephone, can you describe in a general way what the reports which you saw were?

A You can't or I can't differentiate between those that might have involved Mr. Halperin and those that may [24] not have.

Q That is of course our answer to Mr. Christenbury's objection.

A What I recall is a memorandum form as I recall signed by Director Hoover reporting that our sources have developed the following information and then there would be a series of reports on various items that they had come across. As I recall, it would cover different individuals.

Q What was the nature of the conversation between you and Colonel Haig or Dr. Kissinger about those reports, again not getting into the contents of the specific

report except as it related to one from this tap? Did they for example, come to you and say something about leaks?

A Yes.

Q It was shown by this?

A Yes, that would be the thrust of their having shown me, as I recall it, a particular report which would be on a leak they had found that so-and-so has been talking to so-and-so and that may well be how it was. X was talking to Y and that may well be how Y got the story or got that part of the story that was supposedly secret material that appeared in such and such a paper today or was covered in such and such a broadcast.

Q Do you remember whether any of those conversations related to Morton Halperin?

A No.

Q Do you remember that they did not relate to Morton Halperin?

[25] A No.

Q Did you form any opinion as to the legality of the use of wire taps for this prupose which by this time you were aware was—you had seen some of the reports and you had had those conversations with Haig and Kissinger.

MR. CHRISTENBURY: Excuse me. I have some problems in seeking a legal conclusion from the witness, given his prior testimony that he didn't form any legal determination as to their lawfulness and prior to that, because he was a layman.

If you want to ask him whether he had discussed with anyone or it was raised that the matters were lawful and proper and had been used in prior administrations, then these things—

MR. SLOCOMBE: If he answered that, he would have an opinion or belief. I suppose that I could ask him what was the basis of it, but I thought it would be more orderly to find out first when he had the belief and then if he answered yes, find out the basis of it.

MR. CHRISTENBURY: Very well, proceed.

MR. SLOCOMBE: I take it that the question is pending?

MR. CHRISTENBURY: Yes, we will permit the witness to answer it.

THE WITNESS: I need the question now.

Q BY MR. SLOCOMBE: Did you form an opinion—or if you have trouble with that and it may sound like a legal term—a belief as to the legality of the program which you were by this time somewhat more fully informed of?

A If by that you are asking did I go through a [26] conscious act of evaluating and come to a conclusion, the answer is no.

If you are asking did there exist in my mind a belief, I would have to say that the answer is yes. I had a belief that it was legal.

But, it was not a belief arrived at through the process of raising the question and answering it. The question never arose as to whether it was or not legal and therefore the assumption in my mind has to have been that it was legal. But, it was not a consciously arrived at assumption.

Q I would like to show you a letter dated December 29, 1969 addressed to the President on the FBI letterhead and signed by Mr. Hoover. I will ask you first whether you remember having seen that letter other than in preparation for this deposition or after the letter became a matter of public record in this case in the impeachment inquiry?

A I don't remember having seen it prior to the time of it becoming a public matter.

(Whereupon the above described document was marked as Plaintiff's Exhibit A for identification by the Reporter and is attached hereto.)

Q The second paper which I would like to show you which will be Plaintiff's Exhibit B is a handwritten memorandum on memo paper from the Summer White House, San Clemente, California, with the name at the bottom, John Ehrlichman. I will show you also a single-page handwritten memorandum on White House stationery printed

from Bob Haldeman and addressed to M which will be Plaintiff's Exhibit C and ask [27] you whether you remember having seen either of those two before, again other than in preparation for this deposition, after they became a part of the public record?

(Whereupon the two above described documents were marked as Plaintiffs' Exhibits B and C respectively and are attached hereto.)

Q BY MR. SLOCOMBE: I will ask you whether you have any recollection of receiving what Mr. Ehrlichman has identified as his handwritten memorandum?

A This gets—

Q Or his writing.

A This gets to be a problem of how you split your recollections. I have seen all of this since it has come into the public record and have looked it over. Obviously, as of this morning I recall having seen it before through that. I can't tell you that I recall this morning having seen it before it became—

Q Early in 1970?

A I don't have any recollection of that. These are a couple of literally thousands of pages of paper that passed through or probably passed through my hands during that time.

Q Turning to Exhibit C, is that your handwriting?

A Yes, I think it is.

Q Do you remember writing it?

A No.

Q Turning back to Exhibit A, this letter in appearance is similar to letters which you referred to a moment [28] ago as reports which you had seen coming out of the wire tap program?

A In general appearance, yes. My recollection is that they usually covered a series of reports, rather than what this seems to be which is one report on one individual.

Q The first sentence of Exhibit A, the Hoover letter is:

"Previous communications have set forth information which we obtained from extremely sensitive sources concerning contacts made by Morton H. Halperin."

Did you understand the phrase "extremely sensitive sources," to mean wire taps?

A I am not sure that I would have felt that it necessarily meant wire taps or that it was limited to wire taps. But I did know by this time that there was a program of wire taps under way. So, that would have been a route for what you refer to as "extremely sensitive sources." I had the impression that they had informants and other means of gathering information that could have developed this letter.

Q But that wire taps was one?

A A possible such source.

Q A possible such source. And did seeing this letter refresh your recollection as to whether in that period you knew that there was a wire tap on Morton Halperin's phone?

A I would say yes, in a sense. But qualifying that at this time, Morton Halperin was still not a meaningful name to me except—not in the personal sense, but in a generic [29] sense, that he was—in other words, the identification as a former White House staff member now employed by the Brookings Institution meant more to me than the name Morton Halperin.

Q Is it possible that it meant something to you as the name of someone who you had heard there was a tap on the phone of?

A No, because I don't think I was aware specifically of the names of the people on whom there were taps.

Q Looking at it now, looking at both Exhibit B and Exhibit C, I take it that the M referred to is Magruder in Exhibit C?

A I would agree with that because of my awareness of several other items that are normally a part of this packet of exhibits but have not yet appeared this morning.

Q I take it that it is?

A M was a designation I did use for Magruder at some times. That was my shorthand generally for Mitchell. But in this case, I think it is Magruder because of the contents of other items not yet presented.

Q Possibly also the tone of the memorandum?

A Not necessarily.

Q Do you have now or based on your recollection at the time considering both Mr. Ehrlichman's memorandum and your tone, any understanding of what you were telling Magruder to get going on?

MR. CHRISTENBURY: Excuse me, Mr. Slocombe. It seems like there are other documents. Why don't we get the whole package in front of him?

[30] MR. SLOCOMBE: Sure. I would like to mark as Exhibit D a memorandum on White House stationery dated January 15, 1970 with the printed heading at the top, "Jeb Magruder Memorandum," and as Exhibit E, a page of handwriting which we believe begins "Marshal from DOD—"

(Whereupon the above described documents were marked as Exhibits D and E respectively for identification by the Reporter and are attached hereto.)

MR. SLOCOMBE: The Jeb Magruder memorandum is D.

THE WITNESS: Which is the one from Magruder?

MR. SLOCOMBE: From Magruder to you and Mr. Ehrlichman.

THE WITNESS: That is D.

MR. SLOCOMBE: The page of handwriting is E.

THE WITNESS: Okay.

Q BY MR. SLOCOMBE: Do you remember receiving the Jeb Magruder memorandum, Exhibit No. D?

A I do not today remember receiving it. But again, this is part of the packet that I have seen and I remember having seen it in that context.

Q Is it your handwriting?

A I believe it is, yes. I have every reason to believe I did see it because I am sure this is my writing.

Q On Exhibit E do you recognize the handwriting?

A I don't remember seeing this before today. This is not in my well-known packet of exhibits in this area.

MR. CHRISTENBURY: Off the record.

(Brief discussion off the record.)

[31] (Consultation among all attorneys.)

THE WITNESS: I don't recognize the handwriting, offhand, I don't believe I have ever seen this before.

Q BY MR. SLOCOMBE: Is it Mr. Magruder's handwriting?

A I don't know. I don't know that I would know Magruder's handwriting if I saw it.

Q It is not in the handwriting of anybody on your staff?

A I can't say that at all. I didn't get much material in handwritten form. Most of it that came to me came in typewritten form and I am not a very good source for identifying handwriting.

I can identify Ehrlichman's because I did get a lot of stuff from Ehrlichman in handwriting. In my view it is not Ehrlichman's. In my view it is not mine. In my view it is not Larry Higby's who was my assistant. He was one I did get a lot of handwritten stuff from.

MR. SLOCOMBE: Mr. Christenbury, may the record reflect that you will make inquiries as to who this handwriting is and pursue it with the special prosecutor and pursue it wherever you got the document and what you know about it?

MR. CHRISTENBURY: Mr. Slocombe, because there has been a rather fair amount of expanse of time between the prior time, due more through my fault than yours, I don't recall—my recollection is that it was after Magruder's deposition that I did contact the special prosecutor's office and my recollection is that they could not add any illuminating factors on this. [32] I will double check

again and we will give you something in writing in that regard.

MR. SLOCOMBE: The package came to the special prosecutor from Mr. Magruder?

MR. CHRISTENBURY: That is correct.

Q BY MR. SLOCOMBE: Other than the handwritten memorandum, you have written on Exhibit D a number of notes. I would like to ask you some questions about this. You have written:

"Why carbon copy to E?"

I assume that means Ehrlichman?

A Right.

Q Do you have any idea why you wrote that?

A No.

Q The M?

A Probably because the M means, I assume, Magruder. Again I don't know why the question arose. I am obviously asking why he sent a copy to Mr. Ehrlichman.

Q Is it possible he sent a copy to Mr. Ehrlichman because Mr. Ehrlichman was the original source of the letter?

MR. CHRISTENBURY: Excuse me. I am a little hesitant for the witness to speculate.

MR. SLOCOMBE: If he doesn't know, he can say that he doesn't know.

MR. CHRISTENBURY: I thought that was his prior response, that he didn't know why the letter was sent to Ehrlichman. I wouldn't want him to speculate why. But, if he knows why, he can certainly answer.

[33] MR. SCHWARTZ: I object for the record because anything is possible. I think that the witness answered, if that was the question.

MR. CHRISTENBURY: Do you want him to answer it specifically? I believe that the answer is already on the record that he doesn't know why he inquired.

MR. SLOCOMBE: His answer was because he was wondering about the procedure.

THE WITNESS: I said I didn't know. I was speculating that it was a procedure. The real question was that I was just wondering why he sent a copy to Ehrlichman.

Q BY MR. SLOCOMBE: I suggest that the main reason that Magruder might have sent a copy to Ehrlichman was that if as we have assumed, what he got first was the December 29th letter with Mr. Ehrlichman's handwritten note to Mr. Haldeman on it and Mr. Haldeman's handwritten instruction to Magruder, it might have been a natural thing to send a copy of his response to Ehrlichman as well as Haldeman. I am asking whether that is a possibility.

MR. CHRISTENBURY: I would have to object and instruct the witness not to answer.

Q BY MR. SLOCOMBE: Do you remember whether you received an answer to your question to Mr. Magruder?

A No.

Q The next notation is "see notes." Let's look at the note. You have written in the first paragraph in effect, summarizing the December 29th letter and you have written in the margin "We know this." What was the basis of your statement?

[34] A I have to speculate. I don't know what it was except that I got annoyed frequently with Magruder's process of purporting to be developing original information that was already available and what he is saying is that they checked it out, the J. Edgar Hoover memorandum, thoroughly. Those other facts as they are cited here apparently are repetitious. So I am saying that we knew this and that is in terms of a sarcastic jab at Magruder for wasting time going back over already plowed ground.

Q You had no reason to believe that the so-called "checking it out," was anything other than reiterating the December 29 memorandum?

A I don't know. But the checking out apparently says the same thing that the memorandum says or at least that apparently is what my impression was at the time I made the margin note.

Q You meant by "We know this," that we know that Clifford was going to write the article. As far as you know, you knew it only from the wire tap or from the letter which reported the wire tap?

MR. CHRISTENBURY: I don't know that the witness has testified to that.

THE WITNESS: I am not sure that that is the case.

Q BY MR. SLOCOMBE: No, I am asking what he meant when he said he knew this.

A I am not sure because I can't now reconstruct what we—I am not sure what the sequence was among all those things. So I couldn't tell you for sure what had taken place [35] prior to my receipt of this memorandum of January 15.

Q I would like to call your attention to Exhibit E, the handwritten notes which seem to read:

> "1. Marshall from DOD all the facts of the Clifford secretaryship—a leak was bad about this re: Viet Nam to Joe Alsop, et al.
> "2. Get Dean Rusk involved.
> "3. Continue the efforts to get support from HHH, Westmoreland, Acheson, Lodge et al.
> "4. Activate the Douglas Committee now.
> "5. A major release from DOD on how the war escalated (in detail). It names those involved, et cetera, et cetera (the rise and decline of the Viet Nam War)"

Q BY MR. SLOCOMBE: Did you give any instructions along those lines to anybody in connection with this incident?

A No.

Q Do you remember whether there was any follow-up of your instructions to Magruder that you entered in

handwriting in the January 15, 1970 memorandum when you say "Let's act"?

A No.

Q Did you make any practice with respect to determining whether Mr. Magruder had followed up on instructions from you of that character?

A I generally did not personally follow up. I [36] assumed that once something was put in motion it went through. I did not go back and follow up on this kind of thing in a formal procedural thing. It would be followed up by the staff secretary. Whether this was in that process or not, I don't know.

Q The memorandum from Magruder that has your handwritten instructions would normally be filed how?

A I am not really sure. I don't know what the process was. Something of this sort or of any sort that came to me and that I reacted to in any form and evaluated and issued instructions on or anything else I generally did or often did by means—by means of making notes on an original document that came in to me and then I put it into my out box. I am not sure what the process was that ensued from the time it went out of my box. I am particularly not sure at that time because I don't know what the structure of my office was at that time. I don't know whether by then Higby had come into my office on a direct basis and was handling the administration of the operation of my office or whether that was before he had come in.

Q Why would you have been in the preparation at this period of time? Why would you have been involved in the preparation of an answer to an article about Viet Nam policy to be written by Clark Clifford?

A I am not sure of that because I don't remember the process of this, how this generated or how it came out as a matter of fact. There was at that time very deep concern about the many problems we had in the conduct of the war in Viet Nam [37] and more importantly, the conduct of the secret negotiations that were under way to try and end the war.

There was a high degree of sensitivity about any of these things being impeded or jeopardized by leaks of information. For instance, the fact of the negotiations becoming known or the progress of them or anything of that sort. When there were problems in this area, I was involved. Ehrlichman at times was involved. Magruder was. Butterfield was and many other people were.

Q But neither the December 29 letter nor any of the follow-up relate in any way to leaks; do they?

A I don't know.

Q Do they?

A I don't know. It seems to me that you are getting into the question of what—I have not studied this 29th memorandum. But Magruder's thing where he says, "It will be a strong article against our policy in Viet Nam, utilizing quotes and information."

As regarding the press, if that gets into information that is other than publicly available information, then it very definitely does get into leaks.

Q The December 29th letter also said that Clifford was concerned about sharpening up his attack on Nixon and that he apparently had obtained some old Nixon statements, one of which being to the effect that President Thieu was one of the five greatest men of our time. There was another statement that Viet Nam was one of the finest hours in American history. Clifford felt that whether the article would be published would [38] depend on what alternative he, Clifford, had to offer, and that he, Clifford, asked him what alternative that he would have. This unidentified individual did not indicate what he told Clifford.

A Let's hypothesize for a minute. An alternative that he offered could well have been that there was considerable more of this kind of thing as well as what was in fact under way.

Q How would it have hurt?

A How would it hurt? It was highly secret. The total success depended on the maintenance of secrecy.

MR. CHRISTENBURY: Excuse me, Mr. Slocombe. I thought my recollection was that Dr. Halperin wrote the article. Is that an incorrect assumption on my part?

MR. SLOCOMBE: I don't think they wrote the article. I don't know when the article appeared or if indeed, this version of the article ever appeared.

MR. CHRISTENBURY: I think that that speaks in a rather articulate way in the area of leaks that could have occurred.

MR. SLOCOMBE: Mr. Christenbury, if you want to ask questions along that line, you may. Are you making an objection?

MR. CHRISTENBURY: I think you asked the witness as to whether this could have involved leaks. I think that he indicated that he didn't know, but suggested a fashion in which it could, I think.

THE WITNESS: No. The question could have involved leaks.

Q BY MR. SLOCOMBE: What part of Mr. Ehrlichman's—

[39] A Let me expand on that. Leaks can take a lot of forms other than simply a story that Henry Brandon in the paper or whatever paper he worked for—I shouldn't name other names, but a journalist in whatever paper. The name happens to be in here in one of these things. The leak does not have to be a press leak in terms of a reporter writing a story that someone inside has leaked to him. A leak can also be ostensibly in this kind of thing in the development or the argument for an alternative.

If you want to go back in history, a prime example of that was in the 1960 campaign when—I recognize this is totally irrelevant—President Kennedy or Senator Kennedy then proposed an alternative to the problem of Cuba that was in fact, what Vice-President Nixon knew was under way and it thus broke a security situation on something. This can happen. It does happen. It was a matter of very major concern.

Q Does any part of either Mr. Ehrlichman's memorandum or your memorandum or Mr. Magruder's memorandum relate to the possibility that Clark Clifford's article, when published, would involve a leak?

A I do not know.

Q Will you read them and point to the parts that you think might?

A No. They certainly don't. That is, specifically. But, I don't know that they don't relate to it. Ehrlichman's thing is purely a general statement which is the kind that Ehrlichman warned me that we needed more of which is not grammatically good, but it makes its point.

[40] Q Mr. Magruder's memorandum is largely devoted to counter publicity campaigns; isn't it?

A Magruder's?

Q That is D.

A Yes, the counter action.

Q And by counter action you mean publicity?

A What he is dealing with is one limited area of counteracting this article.

Q Do you remember whether you gave any instructions dealing with any other aspect of the problem?

A No, I don't know that I gave any instructions on any part of it.

Q Do you have any recollection of any other incidents comparable to this in which you or members of your staff or other members of the White House staff took some kind of follow-up action related to an article reporting on an overhear from Halperin's wire tap?

A No.

Q If there were any written records of such an incident, they would normally have been filed with your papers?

A I don't know. I doubt that. I am not sure.

For instance, this kind of thing I would think would not have been filed with my papers because there is nothing.

There is no memorandum apparently originating from me that a file copy of which would have found its way automatically in my file.

In other words, something came in. I wrote on it. It went out. I don't think we were in the habit of making [41] copies. They may have been. But, I don't think so, of making copies and Xeroxes of this kind of a thing for my file. I don't know whether it was preserved in my file or not.

Q Where physically are the files? Where would they be if they would have been preserved, if they are preserved?

A Locked up in the EOB. If you are expecting to find something in my files, that is where my files are.

Q Mr. Magruder's files?

A I don't have any idea. Mr. Higby's are in effect, mine. They are with mine, as far as I know.

Q You don't have acces to any of those files?

A No, sir.

Q The next exhibit goes back in time to June 4, 1969. It will be an exhibit. It is a memorandum from Al Haig to Mr. Kissinger in preparation for a meeting with J. Edgar Hoover. I want to call your attention to the first paragraph, initially, which says:

> "1. Express your appreciation to Mr. Hoover and Mr. Sullivan for their outstanding support in recent weeks in uncovering security problems within the NSC staff. Inform Mr. Hoover that you have discussed these problems in detail with the President (and with Messrs. Haldeman and Ehrlichman)."

Do you recall any such discussions between you and Mr. Kissinger?

A I have already told you that I do recall—I [42] can't put a specific time designation on it. But I do recall discussing the problems of security in the NSC staff with Kissinger, yes.

(Whereupon the aforementioned document was marked Plaintiffs' Exhibit F for identification by the Reporter and is attached hereto.)

Q This memorandum does not help you in any way refresh your recollection as to the contents of those?

A No, it doesn't say anything more than what I already said.

Q Prior to this time then, to May of 1970, which is what I want you next to turn your attention to—

A Okay.

Q Your contact with the program was that you became generally aware of it and you would from time to time see reports or discuss them with other people on the staff and although you have no independent recollection of it now, you wrote this short memorandum and made notes in connection with the Clifford article.

Do you remember any other contact with the program prior to May of 1970?

A No, I don't think so outside of the general facts you have just summarized.

Q You did not therefore participate in discussions of how much longer the taps would continue?

A No.

Q Nor did you have any discussion of the record keeping associated with it?

[43] A Record keeping?

Q Record keeping in the FBI and the renewal procedures by the FBI?

A No.

Q Did you have any impression during this period as to who was responsible for deciding how long the taps would continue?

MR. CHRISTENBURY: Excuse me. I think that the question in general scope is legitimate. I would question your term "impression." If you want to ask him if he knew—

MR. SLOCOMBE: His understanding.

MR. CHRISTENBURY: If he knew who had responsibility, I would permit the witness to answer.

MR. SLOCOMBE: So restated.

Q BY MR. SLOCOMBE: Did you know who was responsible for deciding how long the taps should continue?

A No. As I have already said, I was not to my recollection, involved in the procedure or the procedural specifications of this project at all. I don't think that any of these procedural questions were matters that I addressed myself to or that I was told about.

In other words, there was a procedure that was under way which I was aware of but which I was not directly concerned with.

Q Clearly you did not feel any responsibility for deciding when it would go off?

A The question never arose.

Q Did you make any efforts to find out who was [44] responsible for the procedural aspects of the tap or for how long it would continue and whether renewal requests would be made?

A No. Like I said, the question never arose in my consciousness.

Q I would like now to turn to the period of May, 1970. Do you recall attending a meeting on or about the 12th of May of 1970, attended by Mr. Hoover, the President and yourself?

A I can't answer specifically that I recall such a meeting on or about that date. I did, over the years, attend several meetings with the President and Mr. Hoover and there may well have been such a one at that time.

Q Do you remember attending a meeting in this time period at which the wire tap program was discussed?

A I have no present recollection of such, no.

Q If you can try to focus in on the area of the meetings which you attended with Mr. Hoover and the President in this time period, do you remember the subject of any such meeting?

A Yes.

Q Did any of those subjects relate in any way to wire tapping or detection of leaks or to discovering what people who were opposed to the Viet Nam War were doing? I will take them one by one.

Did the subject of any of these meetings involve wire tapping?

A Not that I recall, no.

[45] Q Did it involve detecting the sources of leaks?

A Well, you asked if I specifically recalled any subject. The specific things I do recall do not fall into that category, no.

Q And focusing your mind on that specific subject, you still don't remember any discussion with Hoover and the President on that subject?

A Specific subjects that I do recall are totally unrelated to the areas that you are asking me questions about.

Q Do you recall whether any of these meetings involved monitoring the activities of persons who were opposed to the Viet Nam War?

MR. CHRISTENBURY: I would object and instruct the witness not to answer.

MR. SLOCOMBE: Mr. Christenbury, it is our contention and a contention which has been sustained by other outside observers that whatever Mr. Haldeman's personal responsibility, the program was used especially after May of 1970, to monitor the contents of the reports which relate largely to activities in opposition to the Viet Nam War and other kind of political activities. I think that we are entitled to know whether Mr. Haldeman was at any meeting at which that subject was discussed because that seems to me to be central to the question of the use of wire tap information in its second year.

MR. CHRISTENBURY: Unless there have been some depositions I have not attended, I don't know of any where the record states that the purpose of these wire taps was to—

MR. SLOCOMBE: I didn't say that the record stated it. [46] I said that other people have reached the conclusion and it is certainly our contention. I didn't say that anybody said it.

MR. CHRISTENBURY: Well, this case is rather narrowly limited to the issue of wire tapping. Now whether they may or may not have had some concern about people who expressed opposition to the war simply is not relevant. I just don't see any relevancy. I have given my instruction to the witness.

Q BY MR. SLOCOMBE: Just for the record, did you ever discuss the program with President Nixon prior to May of 1970, the wire tapping program?

A In the general sense I have talked about, I think that there were probably some discussions either with President Nixon or in which President Nixon was also present.

Q Did you know whether the President, prior to May of 1970, ever saw any of the wire tap summary lists?

A No, I don't know.

(Whereupon a two-page Xerox copy of a document entitled "Sensitive Technical Coverage at the Request of the White House" was marked for identification as Exhibit G by the Reporter and a copy thereof is attached hereto.)

Q Exhibit G is headed Sensitive Technical Coverage at request of the White House. It has written on top of it, "Prepared for Director's Brief 5/12/70."

Let me ask my earlier question another way. Do you remember a meeting at which you were informed or instructed that from now on the wire tap summaries which had previously been sent to Dr. Kissinger and addressed to the [47] President would be addressed and delivered to you?

A I don't remember any such meeting. I do remember that policy change in the program or whatever you want to call it.

Q In the period of May 1970, what would have been the procedure with respect to note taking and records of such a meeting among you, the President and Mr. Hoover?

A There was no established or inflexible procedure. If you are asking if I had been in a meeting with the President and Mr. Hoover, what would have been the note-taking process normally—

Q Yes.

A Normally, probably if there had been any directive requiring action on my part, I would have made a note of it.

Q Was it your practice as it was apparently Mr. Ehrlichman's, to take notes of the headings of discussions?

A No, not to the extent or in the fashion that Ehrlichman did. Mine tended more to be action notes, either directives or things that came to my own mind as a result of what was going on in the meeting that I wanted to follow up on.

In other words, something I was told to follow up on or something I had on my own initiative decided to do something about rather than just notes for the purpose of the record—

Q At this meeting, evidently you were told to change the procedures for the delivery of the—

MR. CHRISTENBURY: Excuse me. I don't believe that the [48] witness recalls that he attended a meeting.

Q BY MR. SLOCOMBE: You said that you do remember being instructed to change the procedures for the delivery of these records?

A Yes.

Q If those instructions had been given to you at a meeting among the President, Mr. Hoover and yourself, would it have been your normal practice to make a note or memorandum of that action instruction?

A Probably, yes.

Q Where would that record have been filed?

A Those are in my files.

Q Which are?

A Those notes are in the same files that I referred to earlier.

Q And are the subject of our pending motion?

MR. CHRISTENBURY: That is correct.

Q BY MR. SLOCOMBE: Do you have Exhibit G by now?

A Yes, I have not looked at it.

Q I would like to ask you to read it over and indicate whether you have ever before, other than of course in preparation for this deposition after all this became public, may have been aware of the content of the memorandum?

A No.

Q Therefore I gather that you do not remember whether Mr. Hoover summarized the contents of this memorandum in any conversation in which you were present?

A I don't remember his doing so, no.

[49] Q Turning to the decision to transfer and make you the addressee of these records, from whom did you receive these instructions?

A I am not sure. I think from the President.

Q In a face-to-face meeting?

A I don't know.

Q Again you don't remember?

A Right.

Q Were you given any explanation of why the change was being made?

A I could only give you a general impression. I can't give you a specific explanation. It was my impression that there was concern on Kissinger's part and the President's, I guess, that were involving reports on members of Kissinger's staff and that it was a difficult problem for Kissinger to receive these reports when he had to deal with these people and rely on these people on a day-to-day basis. It was felt that it was a better procedure, especially

given the heavy burden and the nature of Kissinger's office in any event at that time, that it was a better procedure to have the initial reports come through me, rather than going directly to him, with the thought that any item that was of concern to be brought to Haig or to the President's attention.

Q When you say if there was anything that was an item of concern that was to be brought—

A That appeared to indicate further source of leaks and appeared to indicate that they would provide information going back to leaks that had already taken place or [50] indications of things that might be forthcoming.

Q What were your general responsibilities in the White House at this time?

A They were really all encompassing. I functioned on an across-the-board basis as the manager of the White House office for the President. I worked with all the people on the White House staff at the senior level. In effect, the title was assistant to the President, but the working title has been used that is Chief of Staff. That is not an inapt title. I was involved in vritually everything that the President was involved in.

I guess you could say it was a purely staff position as contrasted to an essentially line position that other staff people had, if that is possible. I operated totally at the President's direction and my time was totally based on what the President was doing or wanted me doing. I did not have other than administrative operation of the White House,—I did not have ongoing, substantive responsibility for policy areas.

But I worked closely with all the people who did, in developing policy recommendations and getting them to the President and getting them augmented.

Q After what happened yesterday, I am almost hesitant to say this and without any disrespect—

A What happened yesterday?

Q You were not aware of what was going on in the foreign policy area? You did not consider yourself as hav-

ing substantive responsibilities for national security decisions?

A That is correct.

[51] Q Did you have such responsibilities for law enforcement?

A No, I didn't in any policy area.

Q I would like to show you what will be the next exhibit which is a memorandum from Mr. Haig to Mr. Sullivan. It is headed R. H. Haynes Memorandum, May 15, 1970. I would like to call your attention to the second paragraph which purports to recount a conversation between you and Haynes. I would like to ask if that accurately states the substance of that conversation?

A I have no present recollection of the conversation. I have no reason to believe that it does not accurately reflect it.

(Whereupon the above described document was marked as Exhibit H for identification by The Reporter and is attached hereto.)

Q In the final paragraph which says that you would advise Kissinger on the evening of May 14 regarding the instructions, do you remember whether you did so in fact instruct him?

A I have the general recollection that I did. I can't recount again the specific occasion of having done so.

Q Do you remember at all whether you did it by telephone or in person?

A No.

Q It is possible that you did it by telephone and you spoke to him on the telephone from time to time?

A Yes, sure.

[52] Q If you spoke to him on the telephone, would you have caused any recording to be made of the telephone conversation?

A No. I didn't make recordings of any telephone conversations, with only one or two exceptions in totally unrelated areas to this.

Q Were you at this time aware that Mr. Halperin was no longer on the staff of the NSC and indeed, resigned as a consultant about a week before?

A I don't know.

Q You don't know if you were aware of it?

A That's right.

Q Was there at this time any discussion which you participated in or which you became aware of, of the legality of wire tapping people who no longer had any connection with the government, other than as former members of the government?

A No.

Q After your conversation with Haynes on the 14th of May, did you in fact, receive the summary reports in accordance with the instructions which you gave, you or your office?

A I or my office? It said in accordance with the instructions? I didn't think the instructions that are spelled out in paragraph 2 of Exhibit H were literally followed.

Q Could you describe in general and specifically as you can, with laborious detail?

A The only exception could be that Higby was to hold it unopened. I think at the outset and again this is a [53] general recollection, that the procedure we were going to follow was that Higby would receive this material and would not open the envelope. He would give it to me unopened. I would open it and review it. I think that very shortly, we changed that process and that he did open it and in other words, he reviewed it prior to it coming to me.

Q I want to come back to that. After you had these in the early stages when you were reviewing them, what did you do with the papers thereafter?

A I am not sure. I have to assume that I turned it over to Higby.

Q And do you know what Mr. Higby did with it thereafter?

A I don't know whether he would then return it to the FBI or whether he was told to put it in my file or in my safe. I am not really sure.

Q Did you have a safe in which you stored sensitive material?

Q I had a small safe in my office that I used for a general purpose. It was for current storage. It was not for filing storage. But, it was for current storage. If I had sensitive material in my possession that I was dealing with or would be dealing with in the next few days, I would sometimes use that safe to store these materials in for a few days. It was a very small safe. It was not used as a continuing file. That was done in some other safe in a secretary's office.

Q Would you please describe what you did with respect to Mr. Higby's role? You said that you would initially [54] open the letters yourself and read them?

A I think so, yes.

Q Thereafter you changed the procedure. How did you change the procedure?

A I changed it in the sense that instead of Higby delivering them unopened to me, that he opened them and reviewed them and brought them to my attention, those that contained information that in his judgment might be something that should be acted upon or considered further.

Q What were Mr. Higby's general responsibilities?

A My administrative assistant.

Q Did he have any substantive responsibilities with respect to national security?

A No, none whatsoever.

Q With respect to law enforcement?

A No.

Q Did you give him any instructions as to how he was to form the judgment as to what to show you?

A None that I can recall specifically. I am sure we talked over the question of what should be brought forth and I don't know—I am not sure whether it was on the

basis that he was to deliver and review it and give anything to me—or, I don't know whether he was doing some sort of preliminary screening.

My impression is that he was doing some preliminary screening and only sending in to me material that had actionable significance.

Q But you gave him those instructions as to how he [55] was to decide what was actionable and significant?

A I didn't say that. I said that I don't recall the specific instructions. I said there was some instruction discussion between us. We worked very closely together on a continuing basis throughout every day.

Q During the period of May 1970 to February 1971 when the tap was terminated, with whom did you discuss the reports that you received?

A I have no specific recollection of any discussion of the reports or any one report or any one specific discussion. I have a general recollection of several discussions with Haig and Kissinger and/or Kissinger. I don't have any recollection specifically of any such discussion with the President at that time. But, there may have been some because I think there were discussions in which the President was involved over the total period of time that this information was coming in. Whether it was after it had been transferred to me or not, I am not sure.

Q You say there were several. Can you attach a number to that?

A No, I can't. I can't even give you a number. I couldn't give you an estimate or a number of how many reports I received.

Q Was it on the order of two or three or 20 or 30? I do not mean that those are the exclusive possibilities. But, in terms of the order of magnitude.

A It would be about two or three or a half a dozen. That is, rather than many dozens.

[56] Q Do you remember whether there were any of those instances in which you discussed the contents of the reports with Haig, Kissinger or President Nixon in which

there was information learned from Morton Halperin's tap?

A I don't know. I don't remember specifically which taps the information related to, whether it was Halperin's or any other specific person.

Q Did you know that Morton Halperin was at that time working with Senator Muskie as a foreign policy advisor and consultant?

A I guess I did because I think that information was identified in some—I mean that fact was identified in some of the information.

Q Did you ever form any conclusion as to the utility and the usefulness of the wire taps?

A My general feeling was that they were not of great usefulness in that they never seemed to develop anything that was definitive. There were indications and pieces of information that raised possibilities and raised concern, but didn't give any answers.

I had the impression that there was also a substantial amount of irrelevant information in the reports that we received in addition to what seemed to have some relevance.

MR. SLOCOMBE: I would like next marked for identification as Exhibit I an FBI memorandum, a 302 form reporting an interview with you which purports to have taken place May 11, 1973.

(Whereupon the above described document [57] was marked Exhibit I for identification by the Notary Public and is attached hereto.)

(Whereupon a luncheon recess was taken, the deposition to be resumed at 1:30 o'clock p.m.)

(Whereupon, at the hour of 1:30 p.m. the deposition of H. R. HALDEMAN was resumed at the same place, the same persons being present.)

MR. SLOCOMBE: I think we had labeled the 302 as Exhibit I.

Q I would like to call your attention to the third paragraph which reads:

> "Mr. Haldeman advised that he recalled receiving summary letters concerning these wire taps and that he received them routinely from the FBI. He said he could not recall who the courier was because the summary letters would actually go to his administrative assistant, Mr. Lawrence M. Higby. He said at first he read all the summaries which came into his office but found them to contain information which really was not of much interest to him. The contents of the letters did not contain any startling information and he eventually [58] delegated authority to read this material to Mr. Higby, who would review the summary letters and bring to his, Mr. Haldeman's, attention only those matters which Mr. Higby felt would be of interest."

First I want to ask whether that statement—not whether you said it to the FBI but whether it is accurate in substance?

A Not exactly. It implies that none of the contents contained the words "startling information." I don't know if I used that. But it implies that there was no information of interest whereas there was from time to time information that I think I did feel was of importance.

But there are also—there was information that covered the whole range of reports on all individuals not just the one involved here that didn't seem to have any merit. I don't mean merit, but any use in determining the source of any of our problems.

Q Do you ever remember telling Mr. Higby of your judgment as to the utility of the information?

A I have no specific memory of doing so. I am sure that in the ongoing process I commented to him on the reports from time to time.

Q What was your understanding at this time as to the procedures for the conduct of the wire tap? Specifically, did you have any knowledge at the point you were the ad-

dressee, of what records the FBI was maintaining of wire taps?

A No.

[59] Q Do you know whether regular renewals were being requested and processed in the normal course?

A No.

Q Did you receive any instructions from the President with respect to proceeding on the matters, other than that you just received them?

A Other than the change in procedures, as far as a conduit for the reports, no.

Q Were you aware of any instruction from the President then or earlier as to the duration of the taps?

A I don't think so, no.

Q Any instructions with respect to what kind of information—from the President or anyone else—ought not to be picked up on the wire taps and recorded?

A No.

Q Specifically, were you aware of instructions given by anybody to minimize the interception of privileged communications such as attorney/client or husband/wife?

A No I was not aware, as I have said earlier in a general sense. This applies to all of these questions of any of the procedural specification of this operation.

Q Did you understand that your function with respect to these wire tap summary reports included an assessment of the continuing usefulness of the taps?

A No.

Q Who did you understand was to be assessing the continued usefulness of the taps?

A I had no understanding of that point. It was [60] not a question of which I was aware.

Q You don't know for example whether Dr. Kissinger had that responsibility in that context?

A I had no idea. The question of who was responsible for this was not a question that came to my consciousness

either at my own initiative or at anyone else's. It just never arose.

Q Did you have any discussion with anyone as to the effect of a continuation of a tap, as to the legality of the tap?

A No.

Q Did you form a belief with respect to the legality of the tap during this period when you were the addressee at the White House of the reports?

A Form a belief? As I said, I have never—I did not consciously ask myself nor did anyone else ask me anything that would remotely relate to that point, the legality of the taps.

I was brought into an ongoing program prior to my being the conduit for the material in the sense that I knew it was on and saw some of the results and engaged in conversations from time to time with people on the subject of the results and the contents.

I don't recall ever being engaged with anyone at any time in any conversation regarding the legality or any of the other procedural aspects of this program. It was an ongoing program of which I became aware during the course of its going on. My awareness came up in the context of the [61] knowledge that the President of the United States and the Attorney General of the United States and the Director of the Federal Bureau of Investigation and the National Security Assistant to the President of the United States—there was no possibility. It was inconceivable that the question of the legality would have arisen in my mind.

In other words, this was clearly a presumption and not a conscious one because the question was not put.

But in the back of my mind, in the absence of any indication of illegality or any question of legality, I operated on the subconscious,—I guess you would have to call it,—a presumption of legality and propriety.

In other words, this was something that was going on. Beyond that, I knew that the technique or the procedure

of wire tapping had been used in the past and was being used at the time in the context in the course of law enforcement investigations and intelligence investigations and that kind of thing. So I had no basis for questioning the legality.

Q The four people you identify were Nixon, Hoover, Mitchell and Kissinger?

A That is correct.

Q How did you understand their involvement in the tap? How did you understand that they had been involved with the tap?

A With the possible exception of Mitchell, I had discussed with them about the taps or they had discussed with me or I was in on discussions among them about the taps.

[62] Let's see. I should say that such discussions were going on. Such discussions were being had by Kissinger and the President at various times.

Now the letters that were coming, once I was receiving them, came from Hoover. So I obviously knew that Hoover knew about it. Maybe I am just assuming on Mitchell.

I probably should correct what I said to withdraw Mitchell's name because that is probably an assumption as of today that might not have been then. The whole thing I am talking about is an assumption because it just never rose to the level of consciousness.

Q None of these conversations that you had with any of the people that you had conversations with or whether it was Nixon, Hoover or Kissinger, related directly to the legality of the wire taps?

A That is correct.

Q You said that you knew the wire taps were used in connection with law enforcement purposes. Did you know whether those taps were instituted pursuant to a warrant or not?

A I knew nothing of the technicalities or procedures or legalities of it at all.

Q Were you familiar with any of the statutes relating to wire tapping?

A No.

Q Were you familiar with any of the court decisions relating to wire tapping?

A No.

Q What did you understand to be the procedure for [63] terminating the tap?

A I had no understanding.

Q What was your understanding as to how long the tap would go on?

A There was none. It was not a question that arose.

Q It was your understanding that it would go on until somebody else turned it off?

A No, that is saying that I had any understanding. I had no understanding.

Q Did you have an understanding as to what criteria would be applied for deciding how long to continue the wire tap?

A No.

Q Did you understand that Dr. Kissinger had any special responsibilities with respect to continuing the wire tap?

A I have said that I had no understanding as to the question of the continuance or the termination.

Q What did you understand it to be? How long would it go on?

A Nothing.

Q It would simply go on indefinitely?

A No. I didn't understand anything. I didn't understand that it would go on or that it would not go on. You can't create an understanding of a subject which never arose.

Could I go back and amplify a little bit on this? It may help to clarify it so that it is perfectly [64] reasonable and understandable. This whole question never arose in my mind because of—you have to recognize my role in this which was as a conduit—I was simply an observer of the conversations or discussions of the results.

At no time in any of this process was I ever instructed nor did I ever assume that I had any responsibility in connection with the procedure, other than the delivery to me of the reports that were involved in this, either of starting or stopping or of any of this sort of thing.

I was not in that kind of a position.

Q Who else was familiar during this period with the wire tap? Who else knew it was on?

A Who else besides whom?

Q Let me ask you specifically. I think that there are people you have identified. They were yourself, Mr. Higby, Mr. Nixon, Mr. Ehrlichman and—may the record show that the witness is nodding yes.

A I thought you were going to assume that I was saying yes to all of them.

Q Dr. Kissinger, General Haig, Mr. Mitchell, Director Hoover and other people in the FBI.

A Right.

Q Anybody else on the White House staff?

A No, no one else that I am aware of. There was no one else I believe in my office. The only other possibility might be in the administrative side of Kissinger's office. I don't know who it was at the time. At any time, he had an administrative assistant of the sort that Higby was to me who, [65] so far as I knew, had total knowledge of everything coming and going within Kissinger's office. Whoever that was at the time probably would also have been aware of it.

Q Was it David Young?

A I don't know.

Q Do you know David Young?

A Yes. David Young was one such person at one point. I can't remember the names of the rest. But, he burned them out at a rapid rate.

Q I want to show you what will be Exhibit J and Exhibit K which are two of the letters which were addressed to you. J is a letter of June 23, 1970 on FBI letterhead and K is November 3, 1970, also on FBI letterhead. It is a two-page document.

(Whereupon the above described documents were marked Exhibits J and K respectively for identification by the Notary Public and are attached hereto.)

MR. CHRISTENBURY: Excuse me, Mr. Slocombe. Before we go ahead, the witness and I have conferred and I think that there is a further clarification as to one of his earlier statements if we might.

MR. SLOCOMBE: No objection.

THE WITNESS: It would simply be that in describing my limited position as a conduit, rather than as involved in the procedures of this thing, other than in receiving reports myself, there was one exception that I was involved in the process of ordering one of the wire taps that was conducted in [66] this program at a later time that had nothing to do with the coverage of Mr. Halperin.

I don't believe I had any involvement in the termination of any of them.

Q In ordering or in your role in ordering that wire tap and in any of the answers to these questions dealing exclusively with that wire tap—if they are say so—in your role in ordering that wire tap, did you have any understanding of procedures for a wire tap program if that wire tap was to be—

A The answer is no. I did not. As far as I have any recollection, I did not at all.

Q I have asked you a series of questions about what you think appropriately characterizes procedural matters and your role with respect to this wire tap.

Did this wire tap in any way expand your understanding or your knowledge of what seemed to you the real issues with respect to that whole range of questions of procedures, duration, relevance and so on?

A No.

Q When you ordered it or participated in ordering the other tap, what did you do?

MR. CHRISTENBURY: without identifying—

MR. SLOCOMBE: Without identifying who it was on.

THE WITNESS: I am not able in my recollection, to tell you what I did except that it is refreshed by material in the record.

Q BY MR. SLOCOMBE: It was refreshed—

[67] A Which would indicate that I or at my direction, a call was made to Director Hoover requesting that surveillance on wire tap coverage—I am not sure how it was put, be placed on the individual.

Q In your role in that order, did you address at all the issue of legality, other than as you have testified?

A No, not at all.

Q Did you address the issues of procedures other than as you have testified?

A No, not at all.

Q The issue of responsibility for limiting the range of subjects that was overheard?

A No.

Q None of the other areas that I have asked you about?

A None at all. The only thing involved was the addition of one other individual.

Q Turning to Exhibit J—

A I am sorry, which was that?

Q That is the June 23 letter, just for the record.

By this time, of course, there was no doubt when you received one of these letters that they were reporting on

wire taps when they used the phrase "extremely sensitive sources?"

A I am not prepared to say that that is the case. There is no doubt that this could, as I said before, encompass in my mind and I would read this and assume that it could encompass the wire taps but I don't know that it would [68] necessarily be limited to that.

Q When you and Mr. Higby received those letters with reference to Mort Halperin, did you have any questions related to taps?

A The question didn't arise in my mind as to what it related to. It related to the ongoing request for information in the effort to determine the information we were after on where the leaks were coming from or the potential problems that might arise from forthcoming leaks.

The point is that it was not my impression that my thought at the time was that the wire taps were the only source of this kind of information.

Q To your knowledge were there other extremely sensitive sources being applied to produce information like this?

A I had no knowledge that there were but I had no knowledge that there were not.

Q Turning to the contents of this letter, it says:

> "Morton H. Halperin, who recently resigned from the National Security Council as a protest against the invasion of Cambodia, was contacted by Howard Gillette (phonetic), who is apparently connected with Project Purse Strings, a group formed to support 'Peace' candidates in forthcoming elections. Halperin, at Gillette's request, agreed to talk to the 'top people' in the offices of Senators Norris [69] Cotton and James B. Pearson on the war in Cambodia. Gillette described Senator Cotton as 'marginal' on the Church-Cooper amendment but said that Halperin's talk could make Senator Pearson save the amendment."

Was reporting of that kind of information to you consistent with your understanding of the purposes of the wire tap?

A I am not sure. On the surface this would, I think, seem to be incidental information that probably didn't have any bearing on the purpose of this or the issue at hand.

On the other hand, as I understood the intelligence process, the intelligence gatherers in this case, the FBI, were not trying to evaluate the information that they got in terms of its relevance. They were simply passing it on to others who hopefully would be able to do that. This was something that might be information that would have a possible application and therefore was passed on with that in mind.

I can see how this kind of thing for instance could be viewed as within the purview of the project in the sense that if Halperin in this case is going to talk to these people about this subject, the war in Cambodia then of course at that time that did still involve some highly secret activities. I don't think up until then these things had been known by the public in terms of bombing. These are things that I am speculating here. I am merely hypothesizing just to show the possibility of an application within even this apparently nonapplicable piece of information. Presumably [70] Halperin was aware of what was being done in Cambodia.

If this was made known to unauthorized persons who then used it in an unauthorized way, it could be highly detrimental as a leak.

As I was talking about earlier in the leak process, especially where you have a national security leak, if it is made to a United States senator or an unauthorized person on that basis who then makes an unauthorized statement to a newspaper reporter or in a television interview—

Q Were you aware that in early May of 1970, Morton Halperin had publicly announced his resignation as a White House consultant and indicated that he would

thereafter work in various groups that were opposed to the administration policy in Viet Nam?

A I don't think that I was aware of the announcement. In a sense, that is spelled out in the description of Halperin in this memorandum.

Q What was your judgment? Was it your judgment that any reporting of activities related to Viet Nam or to foreign policy undertaken by Mr. Halperin was probably within the scope of the purposes of the wire tap?

A No. Let's see. I am not sure. Are you asking for a judgment that I did not make? I can't really answer whether that was my—I can't say that that was my judgment because that was not a question I addressed myself to. Let me say however that I am sure that it would have been my judgment at the time that an activity of Halperin's could be within the purview of the concern here.

[71] I am not saying that all activities were. I wouldn't think that that would be the position that all activities would be. But, this specific activity could be.

In other words, Halperin was supposed to have knowledge of national secrets. I don't know how you would actually define them. But, that would describe them accurately. He was the possessor of classified information. It was in his head.

Presumably and maybe possibly, it was on papers in his possession. Misuse of that information in terms of leaking it in whatever form would have fallen within the area of concern here.

Q Do you remember seeing this letter at the time?

A You mean today do I remember it?

Q Do you today remember having seen the letter in June of 1970?

A No, not specifically, no.

Q Would your instructions to Higby or the pattern that you and Higby had established have required him to send you this letter?

A I can't answer that. I don't know.

Q There were many letters I take it which he did not send you?

A I don't know that.

Q Have you reviewed with your counsel or otherwise, the full set of letters which was addressed to you?

MR. CHRISTENBURY: We have shown Mr. Haldeman the letters addressed to him.

[72] THE WITNESS: Is that the full set?

MR. CHRISTENBURY: Because of the press of time I am not sure that we had an in depth review of them. He has purused the letters addressed to him.

THE WITNESS: That group that you showed me? Was that the full set?

MR. CHRISTENBURY: That was the full set.

THE WITNESS: I would guess it was something around eight or ten. It was something about like that wasn't it?

MR. CHRISTENBURY: Yes.

MR. SLOCOMBE: This is the full set of letters about Halperin?

MR. CHRISTENBURY: We showed him the letters specifically addressed to him relating to Dr. Halperin, right.

Q BY MR. SLOCOMBE: Do you remember receiving any of those letters at the time? If so, which ones?

A The answer to the first part of the question is no in terms of receiving letters. In a general response to the end of your question, I think as I looked over or as I looked them over the other day, they looked familiar. But I can't tell you that I saw this one and I didn't see that one. There is a general sense of familiarity to all of them.

Q Other than simply that they are familiar in format or general sense that you read that letter once before—

A No. I would say the general format, the general tone and general content is familiar but not the specific of describing anyone.

Q Are there any which you specifically remember [73] not receiving but that you specifically believe that you read in preparation for this deposition that you had not ever seen before?

A I didn't review them with that thought in mind. I reviewed them quickly, so I can't answer that.

Q I would like to ask you rather than hand them out to you now, if you would review with your counsel the letters in sufficient detail for you to say whether you believe you saw them contemporaneously or you affirmatively believe that you did not see them contemporaneously or that you were unable to form any conclusion as to whether you did or did not; is that agreeable?

MR. CHRISTENBURY: That is fine. Would you like to do that at this time or what would be your pleasure?

MR. SLOCOMBE: I am agreeable to having you do it at your reasonably earliest convenience and advising me. I think the most appropriate form would be of an affidavit. If there are some questions we could proceed further by written interrogatories.

MR. CHRISTENBURY: I don't have any problem with that. I think that he would rather get it resolved.

(Short recess.)

Q BY MR. SLOCOMBE: Mr. Haldeman, have you had an opportunity to review the letters?

A I have reviewed them all and I am sorry to say that I can't give you a positive or negative response on any of them as to whether I can recall specifically having seen that particular memorandum. I just have to say I don't know on all [74] of them.

Q That being the case, I won't ask you specifically about any of them individually and that includes the November 13 letter which is Exhibit K.

You described yourself as a conduit with respect to these reports. You were a conduit to whom?

A A conduit between the FBI and the White House or from the FBI to the White House.

Q And at the White House end?

A To Kissinger, Haig or the President.

Q And what was it that you would do as a conduit?

A What you do is to pass on. My general understanding was that I would pass on anything that provided useful or potentially useful information regarding a possible source of a past leak or what appeared to be a warning of an upcoming leak.

Q Did you understand that you had any responsibility with respect to information that seemed to you inappropriate or irrelevant that was being reported in these letters?

MR. CHRISTENBURY: Responsibility to whom and with regard to what?

MR. SLOCOMBE: With regard to irrelevant and inappropriate material. Responsibilities I guess, to the President since he was the source of—

MR. CHRISTENBURY: It may be for my own clarification—I presume where you are going is as to whether he had any duties to instruct the FBI that he did not want certain information or [75] wanted certain information.

MR. SLOCOMBE: If you want to ask him that, you may. But I want to ask him whether he had any responsibilities to anyone, if he concluded that the information that he was getting was inappropriate or irrelevant.

MR. CHRISTENBURY: As long as the witness understands the question, I will permit him to answer.

THE WITNESS: My answer would be that I didn't consider that I had any such responsibilities except in a sense, the passive responsibility not to pass along information that I didn't consider relevant. I had no positive responsibility to do anything about it.

Q Specifically, you were not to tell the FBI that you didn't want this kind of information?

A I can't confirm the negative. I was never told that I was to tell the FBI that.

Q Were you told to tell the people that you would pass relevant information on to, if it was relevant, that is Nixon, Kissinger and Haig, that what you were getting out of the tap was irrelevant and inappropriate and that perhaps they would want to do something about it?

A No. I don't recall any interchange in either direction on that point.

Q In reviewing the letters, were you able to form a conclusion as to whether you would have passed on the kind of information that is included in the Halperin letters?

MR. CHRISTENBURY: Excuse me. I have a little trouble with that question. He has indicated that he does not recall [76] seeing or does not have a present recollection of ever seeing these. Given that framework, I don't know whether—I am troubled by the question that in effect, speculates as to what he might have and might not have done given the fact that he simply doesn't recall at this time seeing these documents.

MR. SLOCOMBE: I don't think the question asked him to speculate. It asked him whether he is able, having reviewed the letters, to form a conclusion as to whether he would have passed the information on.

MR. CHRISTENBURY: I still feel that it is placing the witness in a position that he doesn't want to be at this point in time, given his prior testimony.

MR. SLOCOMBE: I would still press the question.

MR. CHRISTENBURY: I want to be helpful because I appreciate what you are doing. Possibly, if the witness feels that he can respond at this time I will permit him to. I guess the question is can he at this time form a conclusion as to whether he would or would not have, six years ago—

MR. SLOCOMBE: Whether it is the kind of information that—the information he just read in those letters is the kind that he passed on to President Nixon and Dr. Kissenger and General Haig.

MR. CHRISTENBURY: I appreciate your point. But I will persist in the objection. I think he has outlined the general standard under which he utilized to pass on such information. That is, if it could involve a potential leak or the possibility of a future leak, that was the standard. I hope that part is helpful.

[77] But since he does not have any present recollection of having seen these documents at that time, I am troubled by the following question. I must object.

(Off the record conference among the attorneys.)

Q BY MR. SLOCOMBE: If we can turn to when the tap was actually taken off, when did you learn that the tap on Morton Halperin's telephone had been discontinued?

A I can't give you a date. I know that it was at a specific time. I don't know when that specific time was. I was told and I don't know by whom, that the program of taps was being stopped and there would be no further reports.

Q You can't recall who told you that?

A No.

Q Did you ever have any contact with Mr. Sullivan of the FBI in this connection?

A I don't think I did in this connection.

Q With Mr. Haynes?

A Well, that name doesn't mean anything to me except as it is recalled by this memorandum and on the basis of his memorandum, I must have met him.

I know I did meet a man who was the FBI White House liaison man and at the outset, I think the first delivery of a report, this man was introduced. There was a meeting set up with me. I was introduced to him. He gave me the report. We talked a little. That is when we set up the procedure that he would deliver those to Higby if I was not available.

I don't think he ever delivered any subsequent [78] reports to me, although it is possible. I think I may have seen him in the corridor or talked with him in passing. I know I embarrassed Higby by not recognizing the guy

when he thought I should have. I hurt his feelings. So I made a point of trying to recognize him. But I never did remember the name.

I think they also changed the FBI liaison man in the midst of this somewhere.

Q But somebody told you that the tap was being discontinued and it was not just the letter stuff?

A I am sure I was told—at least my feeling is now that I was told that it was going to be discontinued and that I learned this. I am not sure from whom I learned it.

It was not from Mr. Haynes. I am quite sure of that.

Q Could it have been from Dr. Kissinger or General Haig?

A We are speculating. It could have been from any of those people. I just am not sure.

Q If I understood you correctly, you said that you heard that the tap was going to be terminated. Did you mean that it would shortly be terminated?

A Yes. That was my understanding. That is my recollection, that I was told that the program was being stopped and that the taps were being taken off and that there would be no further reports from the taps.

Q Were you informed or consulted?

A My opinion is that I was informed.

Q Did you form any conclusion as to the [79] appropriateness of turning the taps off at that point? Do you remember how long the interval was between being told that they would be taken off and the time that the letters stopped or that you learned that it had been done?

A I think it was in a very short frame of time.

Q A day or so?

A Yes.

Q Do you have any explanation for why the taps continued for the period that it did?

A No.

Q Were you aware of the practice by the Federal Bureau of Investigation of terminating wire taps shortly before Director Hoover was to testify on the FBI appropriation?

A I believe that I became aware of this practice. I was told the taps were to be stopped.

Q You were told the reason that it was being done?

A It is my impression and my recollection that all taps that could be removed at that time were being removed and that this program was one such that it was felt that it could be and so it was being.

Q Felt by whom?

A I don't know.

MR. SLOCOMBE: We are at Exhibit L which is a one-page memorandum dated June 15, 1971. It seems to have been continued but we have only received one page. I would like to ask a few preliminary questions about this.

(Whereupon the above described document [80] was marked by the Notary Public as Exhibit L for identification and is attached hererto.)

Q BY MR. SLOCOMBE: What was your involvement? Were you involved in or present at any discussions of the investigation of the Pentagon Papers Affair?

MR. CHRISTENBURY: We will object and instruct the witness not to answer.

Q BY MR. SLOCOMBE: To your knowledge, did the name of Morton Halperin arise in connection with the discussion of the Pentagon Papers investigation?

MR. CHRISTENBURY: I will object and instruct the witness not to answer the question as phrased. As we have discussed yesterday, I don't want to belabor my objections. I think that you do have an appropriate inquiry as to the use of electronic surveillance material by relating it to Dr. Halperin. If you seek to probe these other areas we would certainly not permit the witness to answer.

MR. SLOCOMBE: Mr. Christenbury, the only way to approach that that would be helpful is if the witness was at

a meeting in which somebody said that they wire tapped Halperin and they found out useful information about the Pentagon Papers or something like that.

However, I think that we are legally entitled to know if there was a discussion of Morton Halperin in connection with the Pentagon Papers and some substantive information was reported in that connection which matches information which was available from the wire taps.

There is the blind memorandum which clearly [81] implies that somebody was reporting to somebody, presumably somebody from the FBI was reporting to either somebody in the FBI or somebody at the White House information which was obtained from the tap. I think we have a right to know how that information was used at that time and how it relates to the use of information from the wire tap. But it does not depend on the witness knowing that the information came from the wire tap.

It would be relevant to further use that he knew that information which in fact came from the wire tap, and it was mentioned with the discussion of the Pentagon Papers investigation even if he did not know it came from the wire tap.

I take it that you would not object if I asked him if he was at a meeting where information from Morton Halperin's wire tap was discussed in the context of the Pentagon Papers investigation?

MR. CHRISTENBURY: No, not at all.

MR. SLOCOMBE: I am happy to ask that question without limitation.

Q Were you at any such meeting?

A I have no recollection of any such meeting.

MR. SLOCOMBE: I am happy to have that answer on the record. But I think it is wholly unsatisfactory to limit us to that question.

MR. CHRISTENBURY: I do feel strongly on the point, particularly as I indicated yesterday in light of the interrogatories.

MR. SLOCOMBE: What part of Mr. Halperin's interrogatories makes you take that position?

[82] (Discussion off the record.)

Q BY MR. SLOCOMBE: Would you please examine Exhibit L which is one page of a longer memorandum which reports various information about Morton Halperin? Would you please examine the one page of the multi-page memorandum, the other pages of which are not available to us or to anybody else?

MR. CHRISTENBURY: There is a certain implication that I have the other page. We have been unable to locate the other page.

Q BY MR. SLOCOMBE: Please indicate whether any discussions of the Pentagon Papers investigation in which you were present, the substance of that information that was discussed. Preliminary, have you ever seen this document before today other than in connection with preparation for the deposition?

A I have not seen it in connection with the preparation, I don't think. No, I have not seen it before. I don't believe I have, anyway. I have looked at it.

Q Were you present at any discussion in June, July or August of 1971 in connection with the Pentagon Papers investigation, the substance of the information which is reflected on this one page that is discussed?

A No, not to my recollection. I don't recall being involved in discussions regarding the Pentagon Papers investigation except in a very general sense.

Q Exhibit M is a page from Mr. Ehrlichman's notes of a meeting of June 17, 1971 which purports to be notes of a meeting attended by you, Mr. Ehrlichman, Dr. Kissinger and the [83] President. I want to call your attention to the note numbered 6. I will ask first whether you recall the meeting?

A There is no way I can recall any specific meeting of these four people because there were so many of them. I certainly recall many meetings with these four people involved.

(Whereupon a one-page Xerox Copy of handwritten notes was marked as Exhibit M for identification by the Notary Public and is attached hereto.)

Q BY MR. SLOCOMBE: It was a meeting at which I think other evidence indicates that Dr. Kissinger gave a summary of his knowledge about Daniel Ellsberg.

A Yes. I remember the thing. I remember very clearly at some point—I can't say that it was this meeting—but it would appear from John's notes that it is, Kissinger telling us of Ellsberg's predeliction while in Viet Nam for getting in a helicopter and being flown low over the terrain so that he could shoot and kill Vietnamese as a sort of a sport which was weird enough to have stuck in my mind rather vividly.

The rest of this,

"Always a little unbalanced, drugs; flipped; linked to peaceniks—"

I don't remember any of that. But particularly, those sort of fit a pretty generalized thing, shooting at the peasants. I do recall that and my recollection which isn't mentioned here of the other points that stuck in my mind was that he had very peculiar sexual tendencies.

Q Do you recall the discussion of drugs?

[84] A No.

Q Do you recall any discussion of Ellsberg and drugs in this period?

A No. The only thing in terms of discussing Ellsberg that I do recall is this characterization by Kissinger. I do recall Kissinger describing Ellsberg. But, as I said the only thing that sticks in my mind on it is that thing about shooting at people and the sexual pecularities.

Q Did Kissinger give any indication of the source of his knowledge?

A In fact, Kissinger made a point that he had been very close to Ellsberg in the past at some time.

Q Did Kissinger give any indication apart from the general sense of being close to him of how he knew about these rather more or less esoteric allegations?

A No, I don't recall that he did. These were just—

Q Did anybody ask how he knew?

A Not that I recall, no.

MR. SLOCOMBE: I'd like at this time Exhibit N marked for identification. It is a four-page sheaf of handwritten notes of John Ehrlichman and it is attached hereto.

Q The next item on Mr. Ehrlichman's notes which are heavily excised of a meeting attended by you, Mr. Ehrlichman, the President and we understand from Mr. Ehrlichman, that RMW stands for Rose Marie Woods, which took place on July 10, 1971.

I want to call your attention to the numbered paragraph 11 on page 141. Also I want to call your attention [85] to the paragraph numbered 10.

With reference to numbered paragraph 10, do you have any recollection of that part of the conversation?

A None at all.

Q Mr. Ehrlichman has testified that it is his recollection and I am sure Mr. Schwartz will correct me if I get this imprecise, was that Secretary Rogers had advised that the administration should be tapping more. Does that refresh your recollection?

A No.

Q Of that part of the conversation?

A When was that?

Q This was July 10 out at San Clemente. We understand—

A No.

Q Paragraph numbered 11 which reads:

"Grand jury—don't worry re: taps on discovery re: WTPS."

Do you recall any discussion at this time or any other time about a tap and the impact of taps on calling grand jury witnesses?

A No.

Q Can you offer us any explanation of this remark?

A No, none at all. It doesn't ring any bells.

Q Was there any discussion of the use of wire taps or the use of wire tap information in the course of the Pentagon Papers investigation discussions that you participated in?

[86] A Nothing that I recall at all, no.

Q Were you aware that David Young had access to at least one summary letter in the course of the Pentagon Papers investigation?

A I don't think so.

Q Were you aware of anybody else who had access to the summary letters in the period between the time of the termination of the taps and the time when they were returned to Mr. Mardian and eventually came back to Ehrlichman?

A No.

Q Were you aware of a court order at any time in the Pentagon Papers investigation or trial requiring turning over to the defense electronic surveillance material on Daniel Ellsberg or on Morton Halperin?

A No.

Q Were you aware of an FBI search?

A You are talking about at the time that it happened? I have become aware of those things long after the fact.

Q All of this is up to May of 1973, up to the time that the prosecution was dismissed in May of 1973.

A Yes.

Q Were you aware of an FBI search in June and July of 1971 for records reflecting an overhearing of Daniel Ellsberg on the wire taps?

A No.

Q Of Morton Halperin?

A You mean of records? I am not aware of such.

[87] Q Did you in fact know that Daniel Ellsberg had been overheard on Morton Halperin's telephone prior to May of 1973?

A I don't know if I got one of the reports in which it indicated that he had been. If I did, I guess I was aware. I was not consciously aware of it.

Q Turning now to the disposition of the documents, there came a time when the files in your office relating to this matter were recollected by the FBI or Justice Department officials in 1971?

A I am not exactly sure what took place. I remember that the question arose at some time, and I presume it was then, as to whether my office still retained any of the reports that had been sent to us. I don't remember whether they did or didn't. But the intent was that if we had any, they would be assembled and turned back over to the FBI and it is my understanding that that is what was done.

Q Done by Mr. Higby?

A I presume so, yes, because he would have been the only one in the office that would have known where they were.

Q Were you directly involved in that process at all?

A I don't think so. The only vague recollection I have of perhaps having been involved is opening the safe in my office to see if there was anything still in that safe or anything in the safe. I don't recall that there was.

Q Were you aware of Mr. Sullivan's concern about [88] the disposition of these documents as relayed to the White House by the Assistant Attorney General, Mr. Mardian?

A Not at that time, no. I have read about it.

Q Other than what you have read in the public sources, do you know anything about the removal of the documents from the FBI to the Justice Department and thence to the White House?

A No.

Q Did you call Mr. Mardian to come out to San Clemente in early July of 1971?

A I don't think so.

Q Were you present at any discussion in which Mr. Mardian reported to the President or to Mr. Sullivan concerning the disposition of those documents?

A I don't have any recollection of that and I don't believe I was.

Q Did you ever become aware, other than through reading the newspaper or other public sources, that the documents were eventually put in Mr. Ehrlichman's White House office?

A No. I may have within the matter of a day or two before I read about it in the paper, in that I think I knew at the time that the documents were found or whatever the process was when it was determined they were in Ehrlichman's office and were brought out.

I don't know. But, I remember knowing at the time that they had found those files in Ehrlichman's office and I had not known prior to the time that they were found or [89] were turned back over to the FBI.

MR. CHRISTENBURY: Excuse me, Mr. Slocombe. Perhaps it would be helpful for the witness to indicate when he resigned from the White House, which may be helpful in this regard.

MR. SLOCOMBE: Yes.

MR. CHRISTENBURY: If you would.

THE WITNESS: I resigned on April 30.

Q BY MR. SLOCOMBE: Was there a period of time after April 30 when you still came to the White House?

A Yes.

Q How long did that period continue?

A Probably a couple of weeks, but on a decreasing basis.

Q Would it have continued as late as May 12?

A Probably so, yes.

Q I will identify again for the record, that May 12 is the date the Ellsberg/Russo prosecution was dismissed.

A I should point out at that time I was in close contact with John Ehrlichman, who had resigned at the same time and who at the time shared counsel with me and he and I were being called at the same time to appear before the grand jury, before the senate committee staff and that sort of thing. So, after we left the White House the two of us were together considerably and so I had pretty current knowledge of the developments as they related to John Ehrlichman.

Q Were you aware that the court out here in Los Angeles was informed that Daniel Ellsberg had been overheard on a wire tap on Morton Halperin's phone, but that the records [90] could not be located?

A I became aware of that as it became public.

Q When it became public you were aware of it?

A I guess so.

Q And at that time did you discuss with Mr. Ehrlichman where the records were?

A No, not that I recall. I don't believe so.

Q Do you remember an article which appeared in Time Magazine which was published February 25th, 1973 issue that is dated March 5, 1973, which will be Exhibit O, relating to an allegation of wire tapping by the White House or press people and the White House staff?

A I don't recall this article. Is that the question?

Q That is the first question.

A Do I remember reading the article?

Q Do you remember reading it?

A No.

(Whereupon the above described document was marked Exhibit O for identification by the Notary Public and is attached hereto.)

Q BY MR. SLOCOMBE: Do you remember any discussion in the White House prior to its appearance about how the White House should reply to the allegations?

A No.

Q What was your role at that time in late February of 1973 with respect to White House responses to allegations of improper—of White House responses to [91] allegations of the White House having engaged in activities at least in the view of the allegers, that are improper?

A It depended on what was alleged. It depended on the circumstances and what came up at what time. I was involved to some degree in this. This is a time when allegations were starting to develop at a fairly rapid rate. I was involved in responses and discussions and so on as to some of them and not in others, I believe.

Q Do you remember counseling with anybody as to what responses L. Patrick Gray should make if he were asked about the incident in his confirmation hearings?

A No.

Q Do you remember consulting with anybody in the White House or the President's office about responses they should make?

A To the Time article?

Q Well, on the—

A To this story you mean? The contents of this article?

Q Yes.

A No.

Q With John Dean?

A No.

Q Were you involved in any discussions of trying to find out where this story came from or where the leak in the FBI was?

A At some point, it may be with this story, I do remember the concern about it leaking out through the FBI and [92] that we were told—I don't remember by whom and by we I mean the White House—that there was a reporter at Time Magazine by the name of Sandy Smith I think, who had a direct line into the FBI and was getting a lot of straight leak type information out of the bureau and Time was printing this.

I do remember discussions as to who in the FBI was the source of the leak and I do remember focusing on one individual in the FBI as being the presumed source of the leak.

Q And that could have been this story?

A It could have been because I can't fix this recollection in terms of either a specific story or in time. But it is certainly possible that it was this or a series of stories of this sort at this general time.

Q In your CBS interview with Mike Wallace, you referred to leaks to Time Magazine which you assumed were by Mark Felt.

A Right.

Q Is that the same set of incidents?

A Yes, that is the one I am referring to. I just referred to it here, yes.

Q With whom were those conversations conducted?

A I am not sure. I don't know.

Q Could they have been conducted in any room in which the taping equipment was operative?

A Probably, yes.

Q So that those conversations would be reflected on tape?

A It could be.

[93] Q Do you remember—I assume from your earlier answers you don't—but I will ask for the record, do you remember what L. Patrick Gray said to the Senate Judiciary Committee about these taps?

A No.

Q Do you remember what the White House, the President's office said in response to inquiries about the taps?

A No.

MR. SLOCOMBE: No further questions.

EXAMINATION

BY MR. CHRISTENBURY:

Q I just have a couple of questions.

Mr. Haldeman, earlier in the deposition, you described your role as an assistant to Mr. Nixon in terms of a generalist, to use that term. I wonder if we could focus particularly on your responsibilities as they related to the conduct of national foreign affairs. What were your duties and responsibilities in that regard?

A Well, as far as the substance of conducting the foreign affairs, I did not have a direct line responsibility. As a practical, operating matter, I had the kind of a job as I tried to say earlier, that was a pure staff job. I was involved in everything of any substance or importance that came within the President's purview. Foreign policy was certainly there and national security and all the aspects were certainly a major, if not the major, subject that did concern the [94] President.

As a result of that, I was involved in all of the ongoing development of foreign policy and national security decision making at the highest level, the President's level. But, not procedurally in the sense of the fact that I did not do position papers. I didn't work with the National Security Council. But in the early days of the administration for example, Dr. Kissinger was a new man as far as Nixon was concerned. Nixon was a new man as far as Kissinger was concerned. They didn't know each other.

In fact, Kissinger had opposed Nixon in some of his policies prior to the election of 1968. Kissinger consulted with me frequently and extensively on the process of working with President Nixon and of trying to understand the man and of trying to understand his own position with the man.

He was in a very responsible role but had some insecurity as to exactly where he fit at the outset and how he fit in the overall operation. He found himself misunderstanding and misinterpreting from time to time the mo-

tives behind actions and statements and so forth and would seek clarification through discussion.

So I became quite close on a personal basis to Dr. Kissinger during the transition period and then when we came down to Washington as a result of that, was very much involved in every step of every major national security move.

I was completely brought into it and involved in it, for instance in the whole decision making process and implementation process of the Cambodia bombing in the very early [95] months of the administration which was a highly secret activity and of limited knowledge as to very few people.

I was completely aware of and involved in this. As a matter of fact, also in Dr. Kissinger's early China overtures and the early Viet Nam negotiating overtures and the secret trips to Paris and the covers that we set up for those, which I was involved in.

There were meetings that were held on airplanes in the Paris Airport and with General Haig to go over the developments.

I am just describing the continuing position of total involvement in the sense of being aware of and counseling with Kissinger on the means of implementing and getting decisions to the President and getting favorable decisions implemented after they were done.

He talked with me a lot about his problems with the bureaucracy and consulted with me on that. He talked also about his concern about the leaks. But his concerns were not only as to the NSC, but other parts of the government where they were leaking.

So there was a constant flow of two-way communication and participation all through this period and all through the entire time I was in the White House. The same was true on a limited basis as to the domestic policy areas, but less so because John Ehrlichman was more of a worker on a basis of long range history than Kissinger was at the outset.

Q Let me focus your attention again on Plaintiffs Exhibits A, B, C and D. Plaintiffs' Exhibit A as you recall, [96] is the December 29 summary letter from the Federal Bureau of Investigation to the President regarding an article that Clark Clifford was going to write and the subsequent documents or notes by you and by Mr. Ehrlichman and by Mr. Magruder.

Focusing on that series of documents and events, did you perceive that the activities which you had participated in there were consistent with and required in the interest of national security?

A Absolutely. That was the whole point of the concern here as I look back on it now. There was a concern about what Clifford was going to do and what he might do. It was a concern as it related to two areas as I think I mentioned, the conduct of the war and really more importantly, the conduct of the peace negotiations.

The problems were in dealing with both and most importantly, the problem—Kissinger was very concerned with credibility, with his own credibility in the sense of his ability to deal secretly with the North Vietnamese in the course of peace negotiations.

If the fact of his doing that or anything signalled to them and signals are very important things to Kissinger, that signalled to them that the privacy of their communications was being violated at least he felt it could have broken down the talks. So there was an enormous concern about any such thing coming out. An article of this sort I can speculate could, given the background knowledge that Halperin had about some of these things, have created that kind of concern. Now today, that is speculation, trying to remember [97] back to the situation at that time.

But it seems to me that it is valid. The sensitivity—at least I was led to believe and I had no basis for challenging this at all--the sensitivity of these things was enormous and there was a depth of concern on Dr. Kissinger's part and on the President's part that was very great as to the leaks for this kind of reason and leaks from any source.

Q If an article were to be written critical of and possibly detrimental to the then national situation with regard to the war, did you perceive it as in the interest of the national security and the interest of the national policy to bring forth facts which could clarify and bolster the national position in this regard?

A Yes, especially there may well have been a necessity to counteract if there was a breach of security in some way to counteract and try and cover it up in effect. That is a bad word in my life.

Q Lastly, Mr. Haldeman, I don't want to belabor this point, but you have described your activities generally throughout this period. As to each of the activities that you have described, did you believe in good faith that your actions were lawful?

A Absolutely at all times in every respect.

Q Without repeating in depth all that you have testified, what was the basis of your belief that your activities with regard to electronic surveillance material were lawful?

A Summing it up, I have sort of gone into it in depth before I think—but summing it up, it was knowledge and [98] it was that it was an ongoing practice. It was the knowledge that the current practice had been used and put into motion by responsible officials of the government. There was the total absence of knowledge or of any kind of indication that there was any possibility to the contrary.

MR. CHRISTENBURY: Thank you. No further questions.

FURTHER EXAMINATION

BY MR. SLOCOMBE:

Q Just a few questions more based on the examination by your counsel.

Did you consider yourself a substantive foreign policy expert?

A Expert? No.

Q Did your responsibilities with respect to foreign policy and national security include other than with respect to these wire taps, the evaluation of or analysis of information or intelligence?

A My responsibilities did not in the substantive sense. I was for instance, at the outset the principal contact between the President-elect and the CIA. I set up the procedure for the CIA reporting to the President. I did the revisions in the procedure of the CIA reporting to the President, not only in terms of procedure but in terms of contents because the president found the CIA reports to be totally—not to be totally careful and to be frequently of limited value. He was deeply concerned about the quality of the reporting and the daily briefing and that sort of thing.

[99] Once the procedures were set up and once things were revised, I stepped out of the mainstream of that. Dr. Kissinger maintained the mainstream. In fact, the President moved the control of the CIA reporting process to Kissinger and they reported to him rather than to the President in the daily briefs. I was not a substantive expert.

I did not look at the reports and say that they were lousy reports or that they were wrong. But I looked at them in terms of the fact that they were presenting far more information that the President wanted in these areas and far less than he wanted in those areas and worked again as a conduit at the direction of the President in those areas. I also was asked whether I considered myself to be a substantive expert in foreign policy. I did not. I said I did not.

However, I was clearly the most able and substantive expert in Richard Nixon, of anybody at the White House at that time and Richard Nixon as President of the United States, was the man responsible for the foreign policy of the United States.

Therefore, I was by the posture very much involved in the process of the development and implementation of foreign policy, not as a substantive expert in the subject

matter but as a intimate associate of the man responsible for this area.

Q What was your role then? Without being in any way pejorative, might one describe it as White House public relations, that of making sure the White House story was effectively conveyed to the public?

[100] MR. CHRISTENBURY: Excuse me. Possibly he could help in this regard. I don't see the relevancy of his role, if there was such with regard to the White House public relations.

MR. SLOCOMBE: The relevancy has to do with the opportunity which he had as the expert who was sensitive and responsible in his role as a conduit of what information should be passed on from the wire tap records.

MR. CHRISTENBURY: I don't perceive any relevancy. I think he has responded to your specific inquiries as to the specific articles and as to his role in that regard. That is, his role or his knowledge about public relations generally, that is unrelated to these wire taps. I don't perceive any relevancy.

THE WITNESS: May I respond to that in a sense without answering the question? There is an error in the premise. It is an error in this premise. There is a common failing of lawyers in the world that public relations is something different than it is. One of the greatest pluses of my work was the relationship with Dr. Kissinger, that he was not a lawyer and therefore didn't suffer under that delusion and clearly recognized that a policy that is not understood and properly presented can't be properly executed and that public relations is not a thing apart, but is an integral part of development and implementation of policy, point A.

Point B, I am not and was not and brought not to the White House any expertise in public relations. That is another common delusion of not only lawyers but of everybody else in the world that advertising men are public relations men. [101] The only people who will deny it are the public relations men, who throw up at the thought

because my career prior to the White House was in advertising, not public realtions.

Advertising is a totally different field than that of public relations. I did not bring to the White House any role or perceived expertise in the field or area of public relations nor did I purport to. I was not in fact nor was I considered to be in any sense a public relations expert or operative either before, during or after my time at the White House, as ultimate results proved rather conclusively.

Q Did a part of your responsibilities include what is called advertising or public relations or whatever name is attached to the making sure—

A Well, by saying whatever it is called you could say law or medicine. No doctor would accept that. It wouldn't be much of a doctor. You probably wouldn't accept that. That applies to public relations and advertising.

Q May I describe the function that I am referring to and then if you carried it out, you may say so. Did you make sure that the administration policies and purposes were presented in the most effective light and that criticism of them was answered effectively?

MR. CHRISTENBURY: Just a moment.

MR. SLOCOMBE: In addition to any legal argument, there is a second question that you have put in issue by your question of Mr. Haldeman and his responsibilities at the White House and their relative weight.

MR. CHRISTENBURY: I think that your line of questioning [102] asked what his responsibilities were and we were simply clarifying that.

MR. SLOCOMBE: I am not disputing the relevancy of the question.

MR. CHRISTENBURY: I appreciate that. I will.

MR. SLOCOMBE: Did his responsibilities in the foreign policy area also include making sure that the public was properly informed of the administration's policies and the criticisms of those policies were effectively answered.

MR. CHRISTENBURY: I think that I understand your question. But it seems that in effect, that the question has been answered. Mr. Haldeman explained his role with regard to Dr. Kissinger and the effect on policy, which was not properly understood and was not properly implemented. I think that that is what your question is going to. I am saying that it is on the record and we can have that read back.

What I am saying saying is that I believe the question has been asked and answered already by the witness. If we are going into the area of foreign policy which I gather was the later refinement of your question.

MR. SLOCOMBE: Your understanding is that the state of the record was that the answer was yes? I would be happy to stipulate to that.

MR. CHRISTENBURY: I think that the witness has answered. We could have it read back.

MR. SLOCOMBE: I think it would be hard to find.

MR. CHRISTENBURY: Maybe the witness can explain again what his statement was with regard to Dr. Kissinger and the [103] concept of—

MR. SLOCOMBE: That is not the question I asked.

MR. CHRISTENBURY: I thought that was the way the refinement went. I think that that was my only reservation. I think it is a broad question as to what his role was generally.

(Discussion off the record.)

Q BY MR. SLOCOMBE: With respect to the exhibits, it is the case is it not that those exhibits were to respond, to neutralize the criticism of the policy and not whether or not Clark Clifford's article would reveal information which has been obtained by anybody from classified sources?

MR. CHRISTENBURY: I would only object as to the term "neutralization."

Q BY MR. SLOCOMBE: All right, respond to that and strike "neutralization."

A Counteraction is the word used in here. I don't know that that is the case.

Q If that is the case, what parts of—

A Well, that is the area in which he is dealing here. But, Magruder's response in this particular memorandum—I don't know that that was the basis of concern to begin with.

Q In your instruction, "Let's act," does that not relate to preparing counter measures?

A The preparation for effective counteraction was warranted as was spelled out here.

Q Was it your judgment that it was proper to use information obtained from a wire tap installed to detect leaks [104] to gather material either of substance or of timing and knowing what was going to happen in the future, to neutralize criticism of administration foreign policy that the administration judged to be damaging?

A You are back to neutralizing. It is counteracting whatever might be contained in an action directed against administration policy in the conduct of the war.

Q I accept the correction.

A Okay. The question is that there was no question in my mind but that the concern here was directly a concern within the area and under the umbrella of the conduct of the war and of the peace talks and of national security, in other words.

Q So it would be proper to use information from this source to advance the administration's national security policy in that broader sense?

A No. That is not what I am saying. I would say to be proper to avoid using information—to avoid leaking information to avoid—to be aware of problems or the possibility which is still being dealt with here. I don't even know that this ever happened. But it was a possibility of information being used adversely or in an adverse sense to the national policy and derived from secret sources and classified sources or whatever the proper word is.

Q But counter measures are advanced responding to the substance of the article, not preventing the Clifford article from containing leaked information.

A I don't know that there is any way of preventing the article if he already has the information, from containing [105] the information. I don't know that we knew it was going to contain leaked information. But it was clear at least at times to me in looking at this now years later, that there was a possibility and that that was a source of concern or could have been. I don't know what generated this to begin with. I don't know for that matter that the whole matter was generated by information obtained from wire taps to begin with.

There is indicated that there were other sources involved in the initiation of this area of concern.

Q But the game plan which Magruder developed to which you responded "Let's act," had to do with responding to the substance of the criticism you anticipated Mr. Clifford would make; didn't it?

A Yes, oversimplifying it, yes.

Q Did you think that that was a proper use? Did you think that it was proper to make available information obtained from a wire tap for use for that purpose?

A I don't know that that question ever occurred to me. The concern of the potential information—the concern in the wire tap that seems to me is the potential of the contact between—well, I don't know whether Halperin or Clifford—whether Halperin was then an individual who was in contact with Clifford and with things that he was planning to say.

You have got a situation where you know things are leaking, where you know that there is a danger of exposure of classified secret activities and negotiations for peace and the conduct of the war. That is secret knowledge that is in the [106] mind and perhaps in the papers of an individual who had access to it up to a certain prior point who was then in contact with people who were going to take public positions which could conceivably involve

the use of this kind of information. Why else are they in contact with them?

Q And did you feel you were under any responsibility to limit the use of information obtained from the wire tap to preventing leaks or could it also be used to prepare responses to the substance of criticism?

A I don't think I directed myself or was in a position to direct myself to the use of the material other than bringing it to the attention of Haig, Kissinger or the President.

Q How about bringing it to the attention of Jeb Magruder?

A This whole matter took place before I was in the stream of the receipt of this information. You see, you have not brought into evidence the very puzzling dichotomy of memoranda that preceded all the stuff you have put in here. I find that enormously strange as to how this all got started to begin with and what generated it. If we knew that, we might be able to answer some of what we are looking into here.

MR. SLOCOMBE: I think the difference in the views is clear. I have no further questions.

MR. SCHWARTZ: No questions.

(Whereupon it was stipulated by and between counsel that the deposition may be signed before any Notary Public.)

[107] (Whereupon four pages of handwritten notes of Mr. Ehrlichman were marked as Exhibit N for identification by the Notary Public and are attached hereto.)

WITNESS

[108] STATE OF CALIFORNIA
SS
COUNTY OF

That on , 19 , the foregoing deposition was submitted to H. R. HALDEMAN, the witness, for examination and was read by the witness, at which time any changes desired were entered upon the deposition, and that thereafter the deposition was signed by the witness before me.

Notary Public for the County
of
State of California

[109] STATE OF CALIFORNIA

ss.

County of Los Angeles

I, Sally Yerger, C.S.R. and Notary Public for the County of Los Angeles, California, certify:

That the foregoing deposition of H. R. HALDEMAN was taken before me pursuant to Notice and Court Order at the time and place therein set forth, at which time the witness was put on oath by me;

That the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me, and were thereafter transcribed;

That it was stipulated by counsel that said deposition may be read, corrected and signed by the witness pursuant to Rule 30 (e) of the Federal Rules of Civil Procedure;

That the foregoing deposition is a true record of the testimony and of all objections made at the time of the examination.

I further certify that I am neither counsel for nor related to any party to said action, nor in anywise interested in the outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name and affixed my seal, this day of February, 1976.

/s/ _____

SALLY YERGER

Notary Public in and for the County of Los Angeles, State of California

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-880

HENRY KISSINGER, *et al.*,
Petitioners,

v.

MORTON HALPERIN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is now reported at 606 F.2d 1192. On March 28, 1980, the district court denied without prejudice respondents' motion to disqualify Government counsel.

QUESTIONS PRESENTED

1. Whether a former President is absolutely immune from personal liability for violations of respondents' constitutional rights committed under color of his office when he is sued only after he has left office.

2. Whether federal officials not otherwise entitled to absolute immunity for violations of constitutional rights acquire such immunity by acting in concert with the President.

3. Whether federal officials who failed to obtain a judicial warrant and observe the reasonableness standard of the Fourth Amendment in conducting an electronic surveillance between 1969 and 1971 which was not related to legitimate national security interests should be held blameless under either the doctrine of qualified immunity or that of non-retroactivity.

STATEMENT OF THE CASE

1. **The Wiretap.**

On May 13, 1969, agents of the Federal Bureau of Investigation, acting at the direction of petitioners Nixon, Mitchell, and Kissinger, instituted a warrantless electronic surveillance on respondents' home telephone, which continued uninterrupted for twenty-one months. Although the purported purpose of the surveillance was to discover evidence of unauthorized "leaks" of classified information, no such evidence was ever gleaned from the wiretap. Indeed, as Kissinger testified and the district court found, the surveillance revealed nothing which cast the slightest doubt on Morton Halperin's loyalty or discretion. (Pet. App. 59a.) Not-

withstanding the fruitlessness of the surveillance, petitioners failed for twenty-one months to review its necessity or propriety. Furthermore, petitioners made no effort to limit the surveillance to the matters they were investigating, and consequently numerous conversations concerning personal and political matters were overheard, summarized, and disseminated.

The genesis of the surveillance occurred in April or early May of 1969 when petitioner Nixon, alarmed over the disclosure of sensitive national security information in newspaper stories, determined that a program of electronic surveillance should be undertaken to attempt to identify the source of these leaks. (Nixon Deposition, 17-23; Mitchell Deposition, 20-22) (hereinafter, "____ Dep. ____"). This determination was reached in consultation with petitioners Mitchell and Kissinger, and FBI Director Hoover. (Nixon Dep. 19; Mitchell Dep. 20.) Kissinger was directed by Nixon to provide names of individuals whom Kissinger thought might be potential "leakers." (Nixon Dep. 23, 84.) Nixon further directed that the surveillances were to be conducted by the FBI under the supervision of Attorney General Mitchell. (Nixon Dep. 24, 82-85; Mitchell Dep. 49.)

On May 9, 1969, responding to a story in the *New York Times* that set forth details about American B-52 bombing raids on Cambodia, Kissinger directed his military assistant, Col. Alexander Haig, to draw up a list of those who had access to information about the bombing campaign. (Haig Dep. 143.) Since Morton Halperin, then an assistant to Kissinger on the National Security Council staff, did not have access to the published information about the bombing campaign (J.A. 102),[1] Haig did not include Halperin on the list

[1] "J.A." refers to the joint appendix filed in the court of appeals.

which he prepared for Kissinger. (Haig Dep. 142-143.) Kissinger, however, instructed Haig to give to the FBI the names of four individuals who were not on Haig's list: Halperin, two other members of Kissinger's staff, and a military officer on duty in the office of the Secretary of Defense. Like Halperin, the other two NSC staff members had no access to the published information concerning the bombing operations. (Kissinger Dep. 32-36.) On the other hand, Kissinger listed none of the members of his staff who had complete access to that information. (*Id.*)

Kissinger later stated that the three members of is staff whose names he gave to Haig were individuals who others in the Administration had urged him not to hire. (Kissinger Dep. 10-11.) Halperin in particular had been the subject of strong letters to Nixon and Mitchell from Senator Barry Goldwater urging that Halperin and other hold-overs from the Johnson Administration not be retained. (J.A. 35-37.) Furthermore, according to Kissinger, petitioner Haldeman and the Chairman of the Joint Chiefs of Staff had raised objections over the hiring of Halperin. (Kissinger Dep. 7-8, 10.)

On May 10, 1969 Haig, acting on Kissinger's instruction, visited William Sullivan – then Assistant Director of the FBI in charge of the Intelligence Division – and requested electronic surveillance on the four individuals identified by Kissinger. (Haig Dep. 135-36; J.A. 51.) Haig and Sullivan also worked out procedures for the surveillance which varied considerably from those normally followed for warrantless national security surveillances and included a direction that no records be kept. (Mitchell Dep. 14; Belter Dep. 24; Jones Dep. 24; J.A. 38-45, 51.)[2]

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[2]Messrs. Belter and Jones, whose depositions are referred to

Sullivan forwarded Kissinger's request to FBI Director Hoover, who submitted a memorandum seeking the Attorney General's approval for the four surveillances. This memorandum (J.A. 52) did not include the statement, required by Justice Department regulations, of the activities in which the target of the surveillance was engaged or the type of information anticipated to be obtained from the wiretap. (J.A. 41.) Rather than indicating that there was any unfavorable information in Halperin's security file, the memo stated that a recent background investigation had not uncovered "any pertinent derogatory information." (J.A. 52.) Hoover, however, in a conversation with Kissinger on May 9, 1969, had characterized Halperin as one of the "so-called arrogant harvard-type Kennedy men" who remained in the government. (J.A. 50.)

On May 12, Mitchell signed the memorandum, thereby approving the surveillance. (J.A. 53.) In approving the surveillance, Mitchell did not direct the use of any procedures to minimize the interception of calls which had no relevance to the leak investigation. Moreover, neither Nixon nor Kissinger had given such instructions, and neither they nor Mitchell ever gave such an instruction. (Kissinger Dep. 37; Nixon Dep. 64-65; Sullivan Dep. 131.)

From May 13, 1969 to February 10, 1971 the wiretap was continuously in place on the Halperin home telephone.[3] Over the course of the twenty-one months of

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herein, are the FBI Special Agents who were responsible for supervising the Halperin surveillance.

[3]The logs of the surveillance show that there were earlier interceptions from May 9 to May 12, 1969. *See* Pet. 6. There is no explanation in the record for these interceptions prior to Mitchell's approval.

surveillance, FBI agents were under instructions to listen to all conversations (Belter Dep. 43-44, 57), and to record many of them. (Belter Dep. 92.) The FBI employees monitoring the phone prepared daily logs of some but not all of the conversations. (Belter Dep. 37-38.) The log entries ranged from verbatim texts of conversations to simple notations of the times of calls and the identity of the conversants. (Belter Dep. 39, 91.)

Most of the 638 calls logged were of a personal or political nature and were, as petitioners concede, not even remotely connected with the alleged purpose of the surveillance. (Haig Dep. 38; Nixon Dep. 133, 135; Haldeman Dep. 56; Kissinger Dep. 73-74.) 173 (27%) of these calls were between Mr. and Mrs. Halperin; 277 (43%) of the calls were between Mrs. Halperin – who had never had access to, or was alleged to be leaking, classified information – and third parties; only 182 of the logged calls (28%) were between Mr. Halperin and third parties. (J.A. 116.) The three Halperin children were each specifically identified once in the logs, and 13 other entries in the logs note calls involving unidentified children. (*Id.*) The remaining logged calls were between individuals who used the Halperin telephone and are not parties to this lawsuit.

Based on the material recorded in the logs, letters were prepared by the FBI, signed by Hoover, and addressed to both Nixon and Kissinger at the White House. (J.A. 56 and subsequent letters in record.) This practice continued for a year, after which the letters were sent only to Haldeman, who kept Nixon and Kissinger informed. (J.A. 75-77; Haldeman Dep. 49.) Copies of at least a few of the letters were also sent to Mitchell. (Mitchell Dep. 52.) Petitioners Nixon, Mitchell, Kissinger, and Haldeman were at least generally familiar with the contents of the letters either because they read

them or were briefed on them, and all discussed the contents with at least a few other individuals. All were aware that no information was being obtained relating to leaks and that much other information was being gathered and disseminated. (Haldeman Dep. 55, 56; Nixon Dep. 133, 135; Kissinger Dep. 73, 74, 88, 97; J.A. 57, 73-74.)

Thirty summary letters were provided by the FBI to the petitioners, many of which contained substantial amounts of information pertaining to political activities. Information included in the letters involved matters such as the private views of senators on the Vietnam war, development of a foreign policy position by Common Cause, and the activities of the Muskie presidential campaign. (J.A. 203-06.) In one instance, petitioners learned from the wiretap that Morton Halperin was assisting former Secretary of Defense Clark Clifford in writing an article for *Life Magazine* criticizing the Nixon Administration's Vietnam policy. (J.A. 64-65.) Petitioners then used this advance warning to plan a counter-attack to the Clifford article before it was published. (J.A. 66-72.)

The Halperin surveillance was initiated and continued during a period when Morton Halperin had little or no access to sensitive information. On May 9, 1969 – the same day that Kissinger selected Halperin for surveillance – Kissinger told Halperin that Halperin was suspected by others in the Administration of leaking the Cambodian bombing story. Kissinger and Halperin agreed that Halperin's access to very sensitive material would be cut off for a time so that he could not be accused of leaking. That access never resumed. (J.A. 102-05.) On September 19, 1969, Halperin, over the strong protest of Kissinger, resigned from the NSC staff. (Kissinger Dep. 59.) At that time, Kissinger at-

tempted to persuade Halperin to remain on the staff and offered to resume Halperin's full access to sensitive information. (*Id.*) At Kissinger's request, Halperin agreed to assume a consultant status with the NSC, which he maintained until the following May, but he had no access to any classified NSC information after resigning his full-time position. (J.A. 104.)

Despite Halperin's limited, and eventual absence of, access to sensitive information and the lack of any evidence that he was engaged in leaking, petitioners never reviewed the propriety of the Halperin wiretap. Indeed, they rejected suggestions from experienced officials of the FBI that the tap be terminated. As early as May 15, 1969, William Sullivan, who was directing the wiretap program for the FBI, notified Hoover that no information related to leaks had been uncovered. (J.A. 54.) On May 20, 1969, Kissinger visited Sullivan's office and told him that he wanted the surveillance on Halperin continued "for a while longer." (J.A. 55.) On June 4, 1969 Kissinger met with Hoover and suggested that the surveillance of Halperin continue for "at least another two weeks so that a pattern of innocence can be firmly established." (J.A. 57, 156.)

In mid-June, 1969 Haig, acting for Kissinger, agreed with Sullivan on the discontinuance of the wiretaps of some suspected leakers, but not the one on Halperin. (J.A. 58.) In July, 1969, Sullivan reported to Hoover that "nothing has come to light of significance from the standpoint of the leak in question." (J.A. 59.) On September 15, Kissinger told Haig to instruct the FBI to discontinue the surveillances then underway except for those on Halperin and one other person. (J.A. 60-61.)

In July, 1970, the FBI agent in charge of the surveillance wrote to Sullivan that he had not "noticed much info of value in recent months" and recommended that the wiretap be discontinued. (J.A. 78.) Finally on February 10, 1971, the wiretap was removed. (J.A. 83.)

Following the termination of the wiretap, various efforts were made to conceal the existence of the files relating to the wiretaps. (J.A. 210-13.) At Mitchell's direction, the records of the surveillance were taken out of the FBI without Hoover's knowledge and stored in the White House. The records remained secret until May, 1973 when the Acting Director of the FBI, William D. Ruckelshaus, learned of their existence and informed Judge Matthew Byrne, who was presiding over the trial of Daniel Ellsberg and Anthony Russo, *U.S.* v. *Russo,* No. 9373-C (C.D. Cal.). Because Ellsberg had been overheard on the Halperin wiretap, Judge Byrne ordered public disclosure of the surveillance on May 10, 1973. (J.A. 213-214.)

2. **District Court Proceedings.**

Shortly after learning of the surveillance, respondents filed this action against petitioners Kissinger, Mitchell, Haldeman, and others in June, 1973, alleging that the wiretap was unlawful under the First and Fourth Amendments and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Throughout the proceedings below, respondents have contended that the wiretap was initiated and continued for political purposes and never had a legitimate national security purpose.

Although petitioner Nixon had publicly announced on May 23, 1973 that he had authorized the entire wiretap

program, (J.A. 100), he was not named as a defendant when the suit was filed. During the summer of 1974, the Judiciary Committee of the House of Representatives voted to impeach petitioner Nixon. One of the articles of impeachment included the wiretap program in which respondents were caught up. The Committee's summary of evidence in support of Article II, paragraph (2) states: "The surveillance and investigations served no lawful purpose of his office: they had no national security objective, although he falsely used a national security pretext to attempt to justify them. Information obtained from this surveillance was used by his subordinates, with his authorization or permission, for his political advantage . . . ." Report of the House Committee on the Judiciary: Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146 (1974). On August 9, 1974, petitioner Nixon resigned from office, and on September 8, 1974, President Ford pardoned Nixon. Also, at that point in this litigation, several depositions had demonstrated that Nixon was an indispensable party to the case. It was only after all these events that respondents amended their complaint on September 30, 1974 to include Nixon as a defendant.

On cross motions for summary judgment the district court held that the surveillance was constitutionally unreasonable because of the failure to periodically review the surveillance or to minimize the interception of conversations. The Court declined to rule whether a warrant was required for the surveillance and held that the procedures required by Title III were inapplicable to the surveillance. The court found that petitioners Nixon, Mitchell, and Haldeman were responsible for the

surveillance and were not entitled to qualified immunity because "their activities relating to the wiretap continuance were in violation of established Fourth Amendment rights." (Pet. App. 73a.) It held that petitioner Kissinger and other defendants were not sufficiently involved in the surveillance to be liable for damages.[4] In a subsequent opinion the district court held that plaintiffs were only entitled to nominal damages of one dollar each since they had not alleged any physical or economic injury. (Pet. App. 55a-56a.)

3. The Court of Appeals Decision.

On cross appeals, the court of appeals held for respondents in all respects. It affirmed the district court decision that petitioners were not entitled to immunity for their failure to minimize the surveillance and specifically ruled that petitioner Nixon is not entitled to absolute immunity. On respodnents' appeal, the court reversed the grant of summary judgment as to Kissinger, holding that there were genuine issues of material fact concerning his role in initiating and maintaining the wiretap. Petitioners have not appealed this ruling. (Pet. 7 n.4.)

The court also reversed on the applicability of Title III and held that "Title III will apply to any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities" and remanded for a determination of the purpose of the wiretap. (Pet. App. 28a.) It suggested that there was little evidence to support the

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[4]Respondents had previously agreed to dismiss certain defendants and did not appeal the dismissal of the remaining defendants except for Kissinger.

surveillance after May 1970 when Morton Halperin had no official connection with the government, particularly since the reports were sent to the President's political advisor. (Pet. App. 26a.) It noted that after Halperin left the NSC staff in September, 1969, the national security rationale "would seem almost equally attenuated." (Pet. App. 27a.) Finally, it directed the district court to examine respondents' contention that he was selected for surveillance to bolster the political credibility of Kissinger's staff appointments. (Pet. App. 27a-28a.)

The court of appeals also held that a warrant was required at the initiation of the surveillance and remanded for a determination of whether petitioners had a good faith defense for failure to obtain a warrant. With regard to the appropriate level of damages, the court directed that further proceedings be held, ruling that "even if a constitutional violation inflicts only intangible injury, compensation is still appropriate." (Pet. App. 33a.) Petitioners have not challenged this ruling on damages.

REASONS FOR DENYING THE PETITION

The petition should be denied because (1) no useful purpose would be served by granting *certiorari* on the questions presented because even if the Court were to rule in petitioners' favor, they will still face trial on the question of their liability under Title III, an issue which they have specifically declined to raise in this Court; (2) this is not an appropriate case to determine whether former Presidents enjoy a greater degree of immunity from liability for violations of constitutional rights than do cabinet officers or state governors; (3) the decision below with respect to presidential immunity is

correct because it properly applied this Court's decisions in *Butz* v. *Economou,* 438 U.S. 478 (1978), and *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); (4) there is no reason to consider the immunity issue as it relates to petitioners Kissinger, Mitchell, and Haldeman; and (5) the issues of qualified immunity as a matter of law and non-retroactively depend in part on facts yet to be established, and in any case these issues turn on facts and circumstances unique to this case and therefore are not worthy of this Court's review.

1. Even If This Court Rules In Petitioners' Favor On All Questions Presented, They Will Still Face Trial On The Title III Claims.

Petitioners have specifically stated that they "seek review only of issues relating to respondents' claim that petitioners are personally liable in money damages for the alleged constitutional violations" and do not seek review of the court of appeals decision on Title III. (Pet. 10-11 n.8.) Therefore, review of this case at this time would not constitute a prudent use of this Court's resources because even if it ruled in petitioners' favor on all questions presented, there will still be a trial on their liability under Title III.

In view of the inevitability of a trial on this claim, it would be a waste of the Court's time to consider petitioners' defense to the constitutional violations alleged. Indeed, if respondents prevail under Title III, there may be no need for any court to finally rule on the questions presented because recovery under the statute would preclude recovery under the Constitution. As the court of appeals noted, respondents cannot collect both statutory and constitutional damages for the same

periods of the surveillance. (Pet. App. 31a n.95.) If given the choice, they will elect to recover under 18 U.S.C. § 2520, which provides liquidated damages of $100 per day from each person who violated the statute, as well as punitive damages and attorneys fees. Thus, all of the questions presented by petitioners may well never figure in the ultimate outcome of this case. If they do, there will be time enough then for this Court's review.

2. This Is Not An Appropriate Case To Consider Whether Former Presidents Enjoy Absolute Immunity From Liability For Violations Of Constitutional Rights.

Petitioners treat the issue of presidential immunity in the abstract rather than in relation to the facts of this case. They warn that suits against Presidents could "stop the whole machinery of government" (Pet. 13); that courts will "conduct routine oversight" of the President's official duties (Pet. 15); and that the burdens of litigation threaten "serious interference with the President's conduct of office." (Pet. 17.) They also contend that this case demonstrates that it is a simple matter for "an aggrieved plaintiff to allege that the President had taken some official action with malicious intent" and thereby force an inquiry into his motives. (Pet. 17.)

The principal difficulty with these contentions is that they bear no relation to the facts of this case. Respondents sued petitioner Nixon only after he publicly took responsibility for the wiretap program, after the House Judiciary Committee corroborated respondents' allegations, after Nixon resigned from office, and after the record showed that he was an indispensable party. Indeed, in allowing respondents to depose the former President, the district court concluded that peti-

tioner Nixon was "uniquely capable of clarifying certain of [the] issues" which emerged from the depositions of more than twenty witnesses. 401 F. Supp. at 275. Moreover, petitioner Nixon's deposition has already been taken and he has provided respondents with documents and tapes of his conversations.[5] Everything that petitioners seek to prevent has already taken place — much of it with the acquiescence of the Government — and petitioners have not claimed one iota of demonstrable harm to the institutions of government resulting therefrom. Furthermore, the Government does not ask this Court to shield the former President from a trial on his liability under Title III.

Contrary to petitioners' assertions, this is not a case in which a President is sued for an official and otherwise lawful act which is alleged to give rise to a cause of action only because it was conducted maliciously. Here respondents alleged and the courts below found that the failure to obtain a warrant and to minimize the interception were unconstitutional on their face regardless of Nixon's motive or intention.

It is also significant that petitioner Nixon "resigned his office under unique circumstances and accepted a pardon for any offenses committed while in office. By so doing, he placed himself in a different class from all other Presidents . . . ." *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 486 (1977) (Mr. Justice Stevens, concurring). If this Court denies the petition, the decision of the court of appeals on the unique facts

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[5]Indeed, the Justice Department did not support Nixon — then represented by private counsel — when he sought a protective order to prevent his deposition from being taken and did not seek review by certification or mandamus of the district court's decision that he could be deposed.

of this case will not seriously interfere with the proper administration of the Executive Branch by the President. Few suits against sitting Presidents in their individual capacities will be filed, and courts will – as they have in the past – be quick to dismiss all but the strongest allegations of presidential misconduct.

3. The Court Of Appeals Decision On The Immunity Of Presidents Is Consistent With The Decisions Of This Court.

The court of appeals decision with respect to petitioner Nixon does not warrant review by this Court because it is entirely consistent with the decisions in *Butz* v. *Economou,* 438 U.S. 478 (1978), and *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), which held that cabinet officials and state governors are entitled to qualified rather than absolute immunity in suits arising from the violation of constitutional rights. The analysis employed by the court in *Butz* considered and rejected the argument made in this case on behalf of petitioner Nixon:

> The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects – including some which may infringe such important personal interests as liberty, property and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune

> simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.
>
> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> > "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

438 U.S. at 505-06, *quoting United States* v. *Lee,* 106 U.S. 196, 220 (1882). *See The Floyd Acceptances,* 74 U.S. (7 Wall.) 666, 676-77 (1868) ("We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority").

The Court has also ruled in *Scheuer* v. *Rhodes* that the governor of a state is entitled to qualified rather than absolute immunity, and in *Butz* has stated that "federal officials should receive no greater degree of protection from *constitutional* claims than their counterparts in state government." 438 U.S. at 498 (footnote omitted) (emphasis in original). Chief Justice Marshall, in distinguishing the office of the President from that of

the King of England, stated that the President is the federal counterpart to the governor of a state. *United States* v. *Burr,* 25 F. Cas. 30, 34 (C.C. Va. 1807) ("[t]he first magistrate of the Union may more properly be likened to the first magistrate of a state"). Thus, if the chief executive of a state government is entitled to only qualified immunity, there is no basis for asserting that the chief executive of the federal government is entitled to absolute immunity.

The court of appeals decision is also supported by the text of the Constitution itself. The Impeachment Clause provides that an impeached President is liable to routine court process after impeachment. Art. I, § 3, ¶ 7. "By contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the president of the routine legal obligations that confine all citizens." *Nixon* v. *Sirica,* 487 F.2d 700, 711 (D.C. Cir. 1973). The court also noted that "[b]ecause impeachment is available against all 'civil Officers of the United States,' not merely against the President, U.S. Const. art. II, § 4, it is difficult to understand how any immunities peculiar to the President can emanate by implication from the fact of impeachability." *Id.* at 711 n.50.

Petitioners contend that absolute immunity for Presidents is appropriate because even if citizens have no right of action for violations of constitutional rights, there are "independent safeguards – such as public opinion and the political and impeachment process – that effectively minimize the likelihood of intentional presidential misconduct and that can remedy such misconduct should it arise." (Pet. 19.) The short answer to that argument is that these independent safeguards

failed to deter petitioner Nixon's illegal activities. In the larger context, this argument was implicitly rejected in *Butz* when cabinet officers were denied absolute immunity. They too are subject to public opinion, the political process, and impeachment, but this Court nonetheless ruled that damage actions are an appropriate check on their misconduct. Furthermore, petitioners' position would deprive citizens of personal vindication when their constitutional rights are violated, and this Court has recognized this interest as a significant one. *Butz* v. *Economou, supra,* 438 U.S. at 505; *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

Moreover, by not raising the Title III issues and by acquiescing in a remand for a determination of petitioner Nixon's liability under the statute, the Government apparently concedes that the statutory liability which Congress has imposed in 18 U.S.C. § 2520 applies to former Presidents who violate this law. This being the case there is no basis for the contention that former Presidents nonetheless enjoy absolute immunity when they have violated the Constitution while in office.

4. Even If The Court Decides To Hear Petitioner Nixon's Claim Of Absolute Immunity, It Should Deny The Claim Of Petitioners Kissinger, Mitchell, And Haldeman.

Even if the Court should decide to consider the question of whether a former President is entitled to absolute immunity, there is no reason for the Court to grant the petitions of Kissinger, Mitchell and Haldeman. *Butz* v. *Economou* has definitively held that federal officials from the cabinet rank down enjoy only qualified

immunity, and there is no occasion to review that recent ruling.

There is nothing in *Butz* to suggest that cabinet officials or other high officials, who have qualified immunity, gain absolute immunity by acting in concert with the President. Indeed, the interests of justice require the opposite. If this Court were to hold that Presidents are absolutely immune, then it should permit a person whose constitutional rights are violated to seek redress from others who conspired with the President and not just from lower-ranking agents in the field (who might also claim a derivative immunity). Nothing in the Government's discussion of the reasons for presidential immunity requires that his aides also be immune.

Petitioners' discussion of the issue of immunity for presidential advisors is striking in its failure to mention either Haldeman or Kissinger. Moreover, its description of Mitchell's role as Attorney General misrepresents the basis upon which the district court found him to be liable for damages. Mitchell was not held liable because he advised the President on the legality of warrantless electronic surveillance. The district court held him liable for authorizing the FBI to conduct the surveillance, for failing to direct any minimization of intercepted conversations, for failing to enforce the Justice Department regulations requiring review of such surveillances every 90 days, and for failing to terminate the surveillance when it had not produced any evidence of leaks. (Pet. App. 71a.) Mitchell performed these acts as the nation's chief investigative officer responsible for the FBI — which conducted the surveillance — and not as a legal advisor to the President. The courts of appeals have repeatedly held that prosecutors enjoy only qualified immunity for conduct performed in an investigative capaci-

ty, *Briggs* v. *Goodwin,* 569 F.2d 10, 20 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978), and cases cited therein, and these decisions were left undisturbed in this Court's decision in *Imbler* v. *Pachtman,* 424 U.S. 409 (1976).

5. This Case Is Not In An Appropriate Posture To Consider The Questions Of Qualified Immunity And Non-Retroactivity.

Petitioners contend that they are entitled to judgment because the constitutional rights which they violated were not, in their view, clearly established at the time of the Halperin surveillance and because the rulings of the court of appeals with respect to the Fourth Amendment should not be applied retroactively. These issues are not ripe for review because the court of appeals has remanded the case to the district court for a number of factual determinations which may make unnecessary any consideration of the questions petitioners urge on this Court.

Respondents contend that the surveillance never had a legitimate national security purpose, as the House Judiciary Committee concluded. They also contend that Morton Halperin was selected for surveillance so that Kissinger could bolster his political credibility and that the surveillance was continued to gather information about lawful political activities. Indeed, the court of appeals concluded that there is substantial evidence in the record to sustain these contentions (Pet. App. 26a-28a), and in the present posture of the case, they must be credited.

Surely petitioners do not dispute that it was settled constitutional doctrine that wiretaps conducted for

political purposes violate the Fourth Amendment. Insofar as the district court's factual determinations on remand sustain respondents' view of the wiretap, petitioners' actions would not be entitled to qualified immunity as a matter of law, nor would any questions of retroactivity arise. More importantly, if the district court finds on remand that the surveillance violated Title III, there will be no reason to reach the question of the state of Fourth Amendment law in 1969-71. In this regard, it is important to remember that the court of appeals Fourth Amendment rulings only come into play "for any period during which the District Court concludes that the surveillance was genuinely based on national security concerns." (Pet. App. 31a.)

With respect to their rulings on minimization, both the district court and the court of appeals were clearly correct in ruling that it was settled constitutional doctrine in 1969 that the reasonableness standard of the Fourth Amendment applied to all wiretaps, including those for national security purposes. Minimization has been a recognized element of Fourth Amendment reasonableness at least since this Court's decision in *Berger* v. *New York,* 388 U.S. 41 (1967). In that case, the Court held that in order to be reasonable under the Fourth Amendment, a wiretap must be limited in scope and that the seizing of all communications of all persons using a telephone regardless of their relation to the purpose of the surveillance is not permissible. *Id.* at 59.

The only open question with respect to legitimate national security wiretaps has been whether they require a warrant, not whether they require reasonable efforts at minimization. In *Katz* v. *United States,* 389 U.S. 347 (1967), the Supreme Court ruled that the Fourth Amendment applies to all electronic surveillance. In so

ruling, the Court reserved the question of whether a warrant is necessary to satisfy the Fourth Amendment in national security wiretaps. *Id.* at 358 n.23. ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.") *See id.* at 363-64 (Mr. Justice White concurring). In all other respects the Fourth Amendment requirement of reasonableness has applied to national security wiretaps since 1967.

Contrary to what the Government asserts, *United States* v. *United States District Court,* 407 U.S. 297 (1972) ("Keith"), did not suggest that the application of the reasonableness requirement to national security wiretaps was an open question. That opinion dealt only with part of the question left open by *Katz,* namely, whether a warrant was required for internal security surveillances, and did not deal with the question of what the reasonableness requirement of the Fourth Amendment required apart from a warrant. Its discussion of possible alternative standards, upon which petitioners rely (Pet. 24-25), related to standards for a Congressionally authorized judicial warrant. There is nothing in the opinion of the Court to suggest that it was enunciating new doctrine with respect to the reasonableness requirement. Since *Keith* did not rule on the reasonableness issue – which had been previously settled – and since the lower courts did not base their minimization rulings on that case, there is no retroactivity issue in this case at this time.[6]

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[6]If on remand the district court were to award damages based only on the failure to obtain a warrant and if the court of appeals were to uphold the award, questions of qualified immunity as a matter of law and retroactivity might be presented. In that event,

Finally, the passage of the Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-911, 92 Stat. 1797 (FISA), counsels against this Court involving itself in questions of Fourth Amendment law and national security wiretaps prior to 1978. With the passage of this statute, Congress has decided that all wiretaps of United States citizens in the United States must conform to statutorily required warrant and minimization procedures. Now that Congress has acted, this case — while of significance to the parties — is no more than a footnote in the development of electronic surveillance law. The rulings petitioners seek would have no effect on future surveillances or development of the law in this area. Moreover, it is doubtful that any surveillance other than the one in this case fits the factual circumstances which led the lower courts to conclude that a well-established constitutional principle had been violated. Any future surveillance conducted in this manner would be a violation of the FISA and would give rise to statutory damages under that act.

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the Court might then consider whether to hear those questions. At that time the Court might also wish to consider the alleged conflict between the court of appeals opinion in this case and *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 79-880

In the Supreme Court of the United States

OCTOBER TERM, 1979

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v.

MORTON HALPERIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Washington, D.C. 20530

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REPLY MEMORANDUM FOR THE PETITIONERS

Although much of respondents' factual presentation is inaccurate or incomplete, we confine ourselves at this stage to a brief response to several of respondents' legal arguments why the Court should deny review of the court of appeals' decision.

1. Respondents urge that the Court should not review the presidential immunity issue because, "[i]n view of the inevitability of a trial on [the Title III] claim, it would be a waste of the Court's time to consider petitioners' defense to the constitutional violations alleged" (Br. in Opp. 13). As we pointed out in the petition, however, petitioners have not sought review of the court of appeals' statutory ruling only because of their view that, "even under the analysis of the court of appeals, no liability can be established under Title III" (Pet. 11 n.8). Moreover, if, as

we submit, the President (and his closest advisers) are entitled to immunity from damages liability for decisions made in the exercise of the President's official responsibilities under Article II of the Constitution, that immunity could serve as a defense to statutory as well as constitutional causes of action.

2. Respondents contend that this is not an appropriate case for review of the presidential immunity question for a melange of reasons, among them because (i) President Nixon was personally involved in the surveillance decision, (ii) President Nixon resigned from office, and (iii) this case does not involve "an official and otherwise lawful act" (Br. in Opp. 14-15). We frankly do not understand the first two objections. Indeed, the fact that President Nixon was forced to leave office because of public and congressional disapproval of his actions strongly supports our contention (see Pet. 19) that the threat of damage suits is not essential in order to deter intentional presidential misconduct. Finally, respondents are wrong in viewing the term "official" as a synonym for "otherwise lawful." Clearly, it is within the President's "official" duties to authorize investigations to discover the source of damaging leaks of military and foreign policy information, even if in a particular instance the investigation is carried out in an improper manner.

3. Respondents contend (Br. in Opp. 16-19) that petitioners' absolute immunity claims are foreclosed by *Butz* v. *Economou*, 438 U.S. 478 (1978). The court of appeals agreed, holding that *Economou* removes "absolute immunity * * * for acts not involving adjudication or prosecution" (Pet. App. 36a). This Court's opinion in *Economou*, however, did not adopt such a litmus paper

approach. The Court remarked that, although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, there remain "some officials whose special functions require a full exemption from liability." 438 U.S. at 508. The law accords an absolute immunity when it is required by "public policy" and is "essential for the conduct of the public business." *Id.* at 506, 507.

This case offers the Court the opportunity to consider whether the President of the United States and his closest advisors[1] fall within the narrow category of Executive Branch officials recognized in *Economou* whose "special functions" require an absolute immunity from private damage suits. Nothing in respondents' submission diminishes either the exceptional importance of this legal issue or the need for this Court's review.[2] If the President

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[1]Here, petitioner Mitchell has been sued for his actions as Attorney General in advising the President on matters of law (see 28 U.S.C. 511), petitioner Kissinger has been sued for his actions as National Security Advisor in counseling the President on the security impact of leaks of sensitive information (cf. *Snepp* v. *United States*, Nos. 78-1871 and 79-265 (Feb. 19, 1980), slip op. 3 n.3), and petitioner Haldeman has been sued for his actions as Assistant to the President in serving as the White House manager and recipient of FBI reports on the ongoing investigation into leaks of classified information.

[2]Respondents' attempts to minimize the importance of the court of appeals' decision are insubstantial. As we noted in the petition (Pet. 11), before the lower court decisions in this case, no court had ever ruled that the President may be held personally liable in money damages for official acts that he takes during his conduct of office. The District of Columbia Circuit's rejection of absolute presidential immunity is particularly significant because virtually all *Bivens*-type suits against the President may be brought in that jurisdiction. Indeed, in at least one other case now pending, petitioner Nixon has

may be sued for damages based on his acts as President, this Court, and not the court of appeals, should make that judgment.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980

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been sued for damages by a former government employee for his refusal as President to order the rehiring of the employee. See *Fitzgerald* v. *Butterfield*, Civ. No. 74-178 (D. D.C. Mar. 26, 1980), appeal dismissed, No. 80-1407 (D.C. Cir. April 30, 1980), pending on petition for certiorari, No. 79-1738. Moreover, another damages action against the former President is now before the Second Circuit. *Clark* v. *United States*, 481 F. Supp. 1086 (S.D. N.Y. 1979), pending on appeal, No. 80-6016 (2d Cir.).

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No. 79-880

In the Supreme Court of the United States

OCTOBER TERM, 1979

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

QUESTIONS PRESENTED

1. Whether the President and his closest advisors, including the Attorney General, are absolutely immune from personal damages liability for decisions made in the exercise of the President's official authority.

2. Whether these federal officials are entitled to a qualified immunity as a matter of law for authorizing electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972).

3. Whether the Court's decision in *United States* v. *United States District Court*, and lower court rulings amplifying that decision, should be applied retroactively to create personal damages liability for federal officers.

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*Additional petitioners are Richard Nixon, John N. Mitchell, and H.R. Haldeman. Additional respondents are Ina Halperin, David Halperin, Mark Halperin, and Gary Halperin.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–53a) is reported at 606 F.2d 1192. The opinions of the district court (Pet. App. 54a–59a, 60a–77a) are reported at 424 F. Supp. 838 and 434 F. Supp. 1193.

JURISDICTION

The judgment of the court of appeals (Pet. App. 78a–79a) was entered on July 12, 1979. On October 2, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 9, 1979. The petition for a writ of certiorari was filed on December 7, 1979, and was granted on May 19, 1980 (I J.A. 355). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set out in the petition at pages 2–4.

STATEMENT

1. Between February and April of 1969, President Richard Nixon and several of his top advisors became increasingly concerned about unauthorized disclosures to the press of certain foreign policy documents and classified information. The information that was being improperly divulged revealed the internal formulation of foreign policy on several important and sensitive issues, including strategic arms limitations talks then under way with the Soviet Union, peace proposals for the Middle East, the termination of our military involvement in Vietnam, and the return of the island of Okinawa to Japanese control (I J.A. 218–222, 309–310; II J.A. 9–10, 13–14). The President and his advisors believed that the untimely release of this classified information would seriously jeopardize the gov-

ernment's foreign policy initiatives in these areas (I J.A. 310).[1] They also believed that a likely source of these leaks was personnel at the National Security Council ("NSC") because the leaked information included certain statements made during confidential discussions within that agency (I J.A. 318–321). Between February 3 and April 25, 1969, there occurred in the public press more than 16 disclosures of highly classified information either from NSC files or dealing with NSC matters (I J.A. 319–320; II J.A. 15).[2]

Accordingly, on April 25, 1969, President Nixon met with Attorney General John N. Mitchell, NSC Director Henry Kissinger, and FBI Director J. Edgar Hoover to discuss methods for controlling these breaches of security. Director Hoover informed President Nixon that electronic surveillance, including wiretaps, was an effective method of determining the source of leaks and had been used by previous administrations for similar reasons (I J.A. 223,

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[1] Administration officials were concerned that these leaks, in addition to disseminating classified information, might raise serious questions about the United States' credibility and reliability in dealing with foreign governments on a confidential basis and might serve to inhibit critical discussions and vigorous debate within the Executive Branch itself (I J.A. 220, 222; II J.A. 17, 23, 75). For example, because of the position of the Cambodian government, the continuation of bombing missions against North Vietnamese sanctuaries in Cambodia depended upon strict secrecy (II J.A. 18, 26; see also pages 3–4, *infra*). Similarly, the initiation of relations with the Peoples Republic of China also hinged on preserving the secrecy of negotiations (II J.A. 37–38).

[2] The National Security Council was originally established in 1947. After a reorganization by President Truman in 1950, the NSC was extensively used by President Eisenhower in the formulation of national defense and foreign policy. Although the Council occupied a much lesser role in the Kennedy and Johnson administrations, it returned to a position of importance under President Nixon. See S. Rep. No. 94–755, 94th Cong., 2d Sess., Book I at 42, Book VI at 244–250 (1976). President Johnson cautioned President Nixon about reviving the NSC as a major policy-making body because of a concern over the possibility of leaks (II J.A. 10–11, 82–83), and President Eisenhower, while supporting the action, also expressed serious concern regarding NSC leaks (II J.A. 13–14).

315, 325-326; II J.A. 15-17, 34, 141-142, 216).[3] Attorney General Mitchell advised the President that the use of wiretaps to discover the source of the leaks would be legal (I J.A. 223, 315, 326; II J.A. 17, 34, 62, 178-183, 190, 216).

President Nixon thereupon authorized a program of electronic surveillance and adopted three criteria to identify individuals who would be investigated: (a) access to classified material that had been leaked; (b) unfavorable information in the individual's security file; and (c) FBI investigations that listed the individual as a potential source of leaked information (I J.A. 48-49, 212-213, 326; II J.A. 16-17, 20, 45, 209-211, 218, 231-232). At the President's direction, Dr. Kissinger prepared a list of officials who had access to leaked information (I J.A. 48-49, 223, 317; II J.A. 19-20, 28, 62, 211). Morton Halperin, Chief of the NSC Planning Group, was on that list (I J.A. 223-224).[4]

Serious leaks from or pertaining to the NSC continued in late April and early May of 1969, and at least four more such leaks appeared in the news media between April 27 and May 6 (I J.A. 320; II J.A. 15). On May 9, 1969, an article was published in the *New York Times* that contained classified information concerning United States' bombing missions against North Vietnamese sanctuaries in Cambodia (I J.A. 220; II J.A. 18, 27). This disclosure of extremely sensitive information caused the leadership of Cambodia to denounce the bombing and prompted the dis-

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[3] President Johnson had previously told President Nixon that he had employed wiretaps in national-security cases and considered their use to be legal (II J.A. 34). See S. Rep. No. 94-755, *supra*, Book III at 321-323; see also *id.* at 328-330.

[4] In this capacity, Dr. Halperin had access to highly confidential information on major policy issues during this period. Among other things, Halperin attended NSC Review Group meetings on such subjects as the United States' strategic posture, the SALT negotiations, and the war in Vietnam, and received various confidential intelligence reports and limited distribution cables on the war in Vietnam and the Paris peace negotiations (I J.A. 223-224).

continuance of that military operation (II J.A. 18–19, 26–27).[5] At the President's request, Dr. Kissinger called Director Hoover and asked him to investigate the source of the security leak (I J.A. 170, 336–337; II J.A. 19, 27, 218–219). Several hours later, Hoover called Kissinger to inform him that Halperin was a likely source (I J.A. 171–175; II J.A. 222–223, 227–228), and a wiretap was installed on Halperin's home telephone that evening (I J.A. 46, 61, 82–83).[6] Acting pursuant to the President's authorization, Attorney General Mitchell formally approved the wiretap on May 12, 1969 (I J.A. 82–83, 175–177; II J.A. 159–160).

In authorizing the surveillance, President Nixon indicated that the wiretaps should be limited to those circumstances that truly involved the national security and required the use of electronic surveillance (II J.A. 17, 19, 21, 23, 44, 45, 49, 58) and that the wiretaps should be terminated as soon as they were no longer necessary (I J.A. 182; II J.A. 44, 45, 58, 92). Neither the President nor the Attorney General believed it necessary to give specific instructions concerning the actual operation of the investigation; such matters of detail were left to Director Hoover as the expert in the area, and they presumed that he would observe all applicable Department of Justice procedures (II J.A. 28–29, 42–44, 48–49, 61–63, 134, 183–184).[7] Petitioners Kissinger and Haldeman also assumed that the FBI would comply with established legal requirements (II J.A. 213, 269–271, 304).

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[5] This leak was of particular concern because the information disclosed in the article had been held on a strict need-to-know basis and had not yet even been discussed at an open NSC meeting (II J.A. 19).

[6] Dr. Halperin was selected for surveillance on the grounds that Director Hoover had identified Halperin at the April 25 meeting as having unfavorable information in his security file, that Dr. Kissinger had included Halperin's name on the list of key NSC personnel with access to leaked information, and that Hoover had advised Kissinger on May 9 that a preliminary investigation showed Halperin to be a principal suspect regarding the leaks (I J.A. 172–175, 223–224, 326, 327; II J.A. 120, 210–211, 214, 216–218, 222–223, 228, 230–231).

[7] On May 6, 1969, Attorney General Mitchell had promulgated procedures to be observed by the Department of Justice in cases of war-

Because the success of the investigation depended on secrecy, and because disclosure would have had a detrimental effect on the morale of those working in the new administration and on relations with foreign governments (II J.A. 17, 23), the President directed that the investigation be "closely held" (II J.A. 43). In accordance with this direction, Director Hoover decided that only one master copy of the surveillance logs would be maintained and that surveillance materials would not be kept in the general files of the FBI (Sullivan Dep. 42–43). Summaries of information obtained through the investigation were prepared and sent to the White House for the President and Dr. Kissinger (I J.A. 225; Sullivan Dep. 42–43; Haig Dep. 41–43).[8] On occasion, copies of the summaries were also sent to the Department of Justice for Attorney General Mitchell (I J.A. 249, 264; II J.A. 162). The summaries were generally handled by the staff in these offices and only rarely, if ever, were they read personally by the President, the Attorney General, or the NSC Director (II J.A. 50–53, 84, 100, 162–164, 166–167, 170–171, 213, 238, 246–247, 248–249). In May 1970, this system of distribution was modified to have the summaries sent to H.R. Haldeman, Assistant to the President, who would bring pertinent information to the attention of the President and

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rantless national-security wiretaps. The Attorney General's directive provided that initial and renewal applications for such wiretaps contain specified information justifying the surveillance and that extensions beyond 90 days be approved in writing by the Attorney General (Pet. App. 7a n.22, 68a–69a n.6; I J.A. 161–164; II J.A. 133–138). Compare *Warrantless Wiretapping and Electronic Surveillance—1974: Joint Hearings Before the Subcomm. on Administrative Practice and Procedure and the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and the Subcomm. on Surveillance of the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. 70 (1974) (statement of former Attorney General Ramsey Clark) (quarterly accounting of electronic surveillance but no renewal requirement).

[8] Initially, these summaries were reviewed by Dr. Kissinger's aide, General Alexander Haig, at the office of Assistant FBI Director William C. Sullivan (Haig Dep. 17–23; Sullivan Dep. 53–54). Beginning on May 28, 1969, the summaries were distributed to the White House.

Dr. Kissinger (I J.A. 225, 232, 251, 264, 343-344; II J.A. 78-79, 295-296).[9]

Despite the administration's efforts to maintain the integrity of confidential information, the problem of leaks persisted throughout the period 1969-1971, with "serious adverse effects upon our national security and our relations with our allies" (I J.A. 224-225).[10] While the wiretaps continued, Dr. Halperin resigned his full-time position with the National Security Council in September 1969 and his position as a consultant to the NSC in May 1970 (I J.A. 223; II J.A. 85).[11] Because the continuing surveillance failed to reveal that Halperin was the source of the leaks, the wiretap was removed from his phone on February 10, 1971 (I J.A. 211).

2. The existence of this wiretap was disclosed during the trial of Daniel Ellsberg in May 1973 (I J.A. 48). After learning of the wiretap, Dr. Halperin and his wife and children (the respondents) filed this action in the United States District Court for the District of Columbia, alleging that the wiretap was unlawful under the Fourth Amend-

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[9] This change in distribution resulted from Director Hoover's view that the summaries were available to too many people and from Dr. Kissinger's request that the summaries no longer be sent to his office in light of his increasing workload as National Security Advisor and his need to deal on a daily basis with those who were under surveillance (II J.A. 78-79, 295-296). Haldeman was selected to receive the summaries and coordinate the information because, as the President's closest aide, "he was totally privy to all of [the administration's] major foreign policy issues" (II J.A. 79).

[10] In October 1969 (I J.A. 190-191) and December 1970 (I J.A. 207-208), the President issued memoranda to Cabinet officers and other ranking administration officials regarding the problem of leaks and the necessity to curb such unauthorized disclosures of confidential information.

[11] When Dr. Halperin left the NSC, he removed, without approval, several boxes of highly classified and sensitive NSC studies and memoranda, including materials entitled "Strategic Arms Limitations Talks, Basic Book," "Strategic Missile Talks," "Vietnam Negotiations," "Vietnam Options 1969," "Vietnam Bombing," and "Major Security Issues" (I J.A. 307). And, of course, Halperin did not expunge from his memory the confidential information he had learned while employed at the NSC (II J.A. 91).

ment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* The suit was brought against petitioners and other federal officers[12] and sought monetary damages and declaratory and injunctive relief.

After extensive discovery (Pet. App. 28a n.85, 65a, 70a),[13] the district court granted petitioners' motion for summary judgment on the Title III claims. The court stated that "[i]nterpretation of this statute and of the President's domestic power thereunder" was entirely unsettled prior to *United States* v. *United States District Court*, 407 U.S. 297 (1972), and that petitioners "should not be held to have acted at their peril in this vacuum," especially in light of "the 30-year history of similar Executive actions" (Pet. App. 66a). The court thus held that

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[12] In addition to petitioners Kissinger, Nixon, Mitchell, and Haldeman, the complaint sought damages from defendants John Ehrlichman, Alexander Haig, William Sullivan, Robert Mardian, Jeb Stuart Magruder, and the Chesapeake and Potomac Telephone Company; FBI Director Kelley was also named as a defendant for purposes of equitable remedies. The district court granted summary judgment in favor of the defendants against whom monetary relief was sought (Pet. App. 74a–77a). The district court also awarded summary judgment to Kissinger because of his "inactive role [in the wiretap] and the lack of oversight authority" (*id.* at 75a).

[13] Respondents engaged in voluminous discovery in this case. They took 22 depositions totalling more than 1,900 pages and were given broad access to a great many documents, including petitioners' personal logs and appointment books, internal government memoranda concerning both the Halperin wiretap and the general policies and procedures for electronic surveillance, and White House tapes. Respondents also had available the information developed during several congressional investigations relevant to this wiretap. See *Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, S. Rep. No. 94–755, 94th Cong., 2d Sess. (1976) (Church Committee); *Dr. Kissinger's Role in the Wiretapping of Certain Government Officials and Newsmen: Hearings Before the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. (1974); *Statement of Information, Committee on the Judiciary of the House of Representatives*, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 93–1305, 93d Cong., 2d Sess. 146–150 (1974) (Judiciary Committee report on evidence from impeachment inquiry into wiretap program). See also Pet. App. 70a–72a nn.7–12.

petitioners had a "reasonable" and "good faith belief" that "Title III was inapplicable to the Halperin wiretap" and that "[respondents] have no cause of action under Title III" (*id.* at 66a–67a).

With respect to respondents' constitutional claims, however, the district court concluded that the wiretap constituted an unreasonable search in violation of the Fourth Amendment. The court recognized that "[t]here was justifiably grave concern in early 1969 over the leaking of confidential foreign policy information," that such leaks "could reasonably be viewed as impeding progress and affecting policy-makers' discussions in [several] areas [of foreign policy]," and that, as "determined by the highest Executive officials * * * [pursuant to] [s]pecific criteria[,] * * * [a] limited number of persons were subjected to * * * electronic surveillance, many for a relatively short time" (Pet. App. 68a). Nevertheless, it held that, "even granting the inapplicability of the general warrant requirement," the wiretap of respondents' telephone was constitutionally unreasonable because it continued for 21 months without an effort to minimize the number or type of conversations overheard (*id.* at 68a–70a). On this basis, the court imposed liability upon "former President Nixon, for having initiated and overseen the program without any temporal or informational limits on the surveillance; Attorney General Mitchell, for having failed to carry out review and renewal obligations during the entire twenty-one month surveillance period; [and] H.R. Haldeman, for having reviewed the wiretap material for over a year without recommending termination and for having disseminated the material for purposes unrelated to the tap's original justification" (*id.* at 73a).

The district court also determined that the President, the Attorney General, and the other petitioners were not entitled to an absolute immunity from damages liability for authorizing an electronic surveillance in violation of the Fourth Amendment (Pet. App. 70a & n.8, 73a). Furthermore, although it found that petitioners' conduct "cannot fairly be characterized as a wanton, reckless or malicious disregard of [respondents'] rights" (*id.* at 56a),

the court held that petitioners were not entitled to a qualified good-faith immunity from damages liability because "their activities relating to the wiretap continuance [were] unreasonable and in violation of established Fourth Amendment rights" (*id.* at 73a) and because they "are charged with knowledge of established law" (*id.* at 74a). Since respondents did not establish any actual injury from the wiretap, however, the court awarded only nominal damages of one dollar (*id.* at 56a).[14]

3. The court of appeals reversed the judgment of the district court and remanded for further proceedings. Relying on its decision in the companion case of *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), petitions for cert. pending, Nos. 79-881, 79-883 (filed Dec. 7, 1979), the court held that the Fourth Amendment requirement of a warrant for electronic surveillance in national-security cases would be applied retroactively to establish a cause of action in damages (Pet. App. 30a). In addition, the court concluded that petitioners' failure to terminate the surveillance within a reasonable period of time constituted a violation of the Fourth Amendment that also gave rise to a damages action (*id.* at 29a-32a). Finally, the court of appeals agreed with the district court that (i) the President and his closest advisors (including the Attorney General) are not entitled to absolute immunity with respect to their authorization and implementation of the surveillance, and (ii) petitioners are not entitled to qualified immunity as a matter of law with respect to the continuation of the surveillance because "there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution" (*id.* at 41a).[15] The court remanded

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[14]The district court also ordered petitioners to insert certain exonerating materials into respondent Morton Halperin's security file and enjoined petitioners from making any use of the intercepted communications (Pet. App. 57a-59a). These portions of the court's judgment were not appealed, and therefore the only remaining issues in this case concern petitioners' personal liability for money damages.

[15]The court of appeals also suggested that the district court had found that the wiretap was continued in bad faith (Pet. App. 41a). As discussed below (pages 60-61, *infra*), however, we believe that the district court made no such finding.

the case to the district court to determine when the continuation of the wiretap became unreasonable and whether petitioners acted in good faith in authorizing a warrantless electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, *supra* (*id.* at 29a, 31a).[16]

SUMMARY OF ARGUMENT

I.

A.

The courts below have held, for the first time since the founding of the Republic, that the President of the United States is subject to personal damages liability for official acts taken in his capacity as the Nation's Chief Executive. This unprecedented ruling is contrary to both the historical understanding of the absolute immunity inherent in the Office of the President under Article II of the Constitution and the compelling reasons of public policy in favor of such a privilege for the President. In light of the principle of separation of powers and the "special functions" of the

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[16] In addition, the court of appeals remanded respondents' statutory claims for a determination whether, as respondents asserted, the primary purpose of the surveillance was not to "protect[ ] national security information against foreign intelligence activities" (Pet. App. 28a). The court held that if some other purpose primarily was intended, petitioners' failure to obtain a warrant would subject them to damages liability under Title III (18 U.S.C. 2511, 2520) (Pet. App. 27a–28a). We have not sought review of this portion of the court of appeals' judgment because we believe that the district court already has determined that the primary purpose of the surveillance was the protection of national security information (*id.* at 61a–62a, 68a) and that any proceedings on remand would support that ruling.

The court of appeals also held that respondents should be awarded more than nominal damages if they can establish emotional distress or other intangible injury (Pet. App. 33a–35a). Finally, the court of appeals reversed the award of summary judgment in favor of Dr. Kissinger, holding that there were genuine issues of material fact concerning his role in the installation and maintenance of the wiretap (*id.* at 49a–50a). We have not sought review of these issues.

presidency (*Butz* v. *Economou*, 438 U.S. 478, 508 (1978)), an absolute immunity is necessary "to protect the decisionmaking processes of [the President]" (*id.* at 503) and "is essential for the conduct of the public business" (*id.* at 507). Accordingly, this Court should reject the lower courts' unwarranted assertion of judicial authority in personal damages suits to engage in routine oversight of the President's official acts.

It has long been recognized that the President is not personally accountable in judicial proceedings for the exercise of his executive powers. The Framers of the Constitution, after extensive consideration focusing specifically on the Office of the President, concluded that possible excesses of presidential authority would be restrained by the power of impeachment, the political constraints of the election process and public opinion, and the system of checks and balances. Nothing in their deliberations suggested in any way that the President would be liable to suit for money damages arising out of the conduct of his Office.

In line with these authorities, few litigants have ever attempted to sue the President for monetary relief. And, on those infrequent occasions when such litigation has been commenced, the federal courts have consistently ruled that the President cannot be held personally accountable for damages.

The doctrine that the President is absolutely immune from personal damages liability for his official acts also rests on sound reasons of public policy and serves to ensure the fundamental separation of governmental powers. Most importantly, the risk of personal liability would inhibit the fearless and decisive exercise of presidential authority, and "the public trust [placed in the President] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler* v. *Pachtman*, 424 U.S. 409, 424–425 (1976). As the Nation's Chief Executive, the President is repeatedly called upon to make discretionary decisions on controversial issues that affect the lives of virtually every American. Especially in the critical

areas of national defense and foreign affairs, the President's discharge of these "grave, complex and unique responsibilities" (Pet. App. 53a (Gesell, J., concurring)) should be motivated solely by considerations of the public welfare, not by fear of damages awards.

Moreover, the President is a natural target for those dissatisfied by the outcome of his decisions. The matters that come to the attention of the President are likely to "arouse the most intense feelings" (*Butz* v. *Economou*, *supra*, 438 U.S. at 509 n.36), and it is all too easy for disgruntled individuals or groups, simply by alleging an "unconstitutional animus" (*id.* at 512), to carry their disagreement from the political arena into the courtroom.

Finally, successful damages suits against the President would be quite rare, and there exist means wholly apart from such litigation—the power of impeachment and the availability of subsequent criminal prosecution, the system of checks and balances, the electoral process and the force of public opinion, and the availability of judicial review of executive actions—to deter the improper exercise of presidential authority. These considerations have special bearing with respect to the President, in light of the express constitutional delegation to him of the full "executive Power * * * of the United States" (Art. II, § 1), the prominence and visibility of his Office, his status as the only elected official in the Executive Branch of the federal government, and his traditional role as the leader of his political party.

By the same token, it is evident that a qualified immunity would be seriously inadequate to protect the "public interest * * * [in the] vigorous and fearless performance of the * * * [President's] duty." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427. A qualified presidential privilege would lead to an extreme and unwarranted interference with the decision-making process of the Executive Branch and the execution of presidential duties by requiring the President to explain and justify his decisions in response to civil damages suits. Indeed, in order to sustain his claim of qualified immunity, the President would generally be

forced to reveal not only the intimate details of constitutionally privileged executive decision-making (*United States* v. *Nixon*, 418 U.S. 683 (1974)), but also the confidential and often highly sensitive information on which he based his acts. It may also be impossible to convey to a lay jury several years later, in the aftermath of subsequent national events and possible political passions, the complexity, gravity, and urgency of controversial presidential decisions—especially decisions (as in this case) in the areas of national security and foreign affairs. Finally, the burdens of such litigation—the time, the expense, the personal anxiety, and the unavoidable distraction from offical duties—should not be imposed upon the President.

B.

Absolute presidential immunity should extend to those who act on the President's behalf at his direction. The responsibilities of the presidency are extraordinarily numerous, complex, and far-reaching. Of necessity, therefore, the President must delegate to others many of the tasks and functions relating to his Office. "[T]he day-to-day work of such aides is so critical to the * * * [President's] performance that they must be treated as the latter's alter egos; and * * * if they are not so recognized, the central role of the * * * [absolute presidential immunity] will inevitably be diminished and frustrated." *Gravel* v. *United States*, 408 U.S. 606, 616–617 (1972). Thus, "for the purpose of construing the privilege * * * [the President] and his aide[s] are to be 'treated as one' " (*id.* at 616), so that the absolute presidential immunity "applies not only to * * * [the President] but also to his aides insofar as the conduct of the latter would be a protected * * * act if performed by the * * * [President] himself" (*id.* at 618).

Because petitioners Kissinger, Mitchell, and Haldeman were "operating under [President Nixon's] specific authority and were carrying out [his] express orders" (I J.A. 48–49), they are accordingly entitled to a derivative absolute immunity in this case.

C.

Petitioners Kissinger, Mitchell, and Haldeman are entitled to absolute immunity from liability based on advice they gave the President on matters within their respective areas of official responsibility. Under the Constitution (Art. II, § 2), the President is authorized to require the opinion of his closest aides and advisors on matters of public policy. The spectre of personal damages liability would unduly interfere with the President's authority to obtain the views and recommendations of high-ranking executive officers. Moreover, this exchange between the President and his subordinates is protected by a constitutional privilege that is "inextricably rooted in the separation of powers." *United States* v. *Nixon*, *supra*, 418 U.S. at 708. A qualified immunity would be inadequate to secure these constitutional principles and would deter the expression of "candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" (*id.* at 708). In light of the "special nature of their responsibilities" as presidential advisors (*Butz* v. *Economou*, *supra*, 438 U.S. at 511), petitioners Kissinger, Mitchell, and Haldeman should be absolutely immune from civil damages actions arising out of their advice to the President.

II.

Petitioners are also entitled to qualified immunity as a matter of law. The doctrine of qualified immunity is premised on the belief that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz* v. *Economou*, *supra*, 438 U.S. at 506–507. The Court's decisions have "emphasized * * * that, at least in the absence of some showing of malice, an official would not be held liable in damages * * * unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation" (*id.* at 498). In *Procunier* v. *Navarette*, 434 U.S. 555 (1978), the Court applied these principles to hold that "since the constitutional right al-

legedly violated had not been authoritatively declared at the time the * * * officials acted, the officials were entitled, as a matter of law, to prevail on their claim of qualified immunity." *Baker* v. *McCollan*, 443 U.S. 137, 139 (1979).

In the circumstances of this case, it is clear that the alleged constitutional violations did not involve "settled, indisputable law" or "basic, unquestioned constitutional rights." *Wood* v. *Strickland*, 420 U.S. 308, 321, 322 (1975). At the time the Halperin wiretap was in operation, the constitutional standards pertaining to national-security surveillance were, at the least, unsettled. The Court had first held the Fourth Amendment to be applicable to wiretaps at all only two years before the Halperin wiretap was installed in May of 1969, and its subsequent opinions recognized the separate and unresolved status of national-security wiretaps. Indeed, several lower federal courts prior to 1972 had upheld the government's longstanding view of the President's authority to conduct warrantless surveillance in national-security cases, and no contrary decisions were rendered until the final month of the Halperin wiretap. In view of the development of the law in this area, it can scarcely be doubted that, at a minimum, the constitutional standards alleged to have been violated here were not "clearly established" during the period of the wiretap.

Moreover, the court of appeals erred in suggesting that petitioners were not entitled to qualified immunity as a matter of law because the district court found that the Halperin wiretap had been continued in "bad faith" (Pet. App. 41a). The district court made no such finding. To the contrary, the court concluded that petitioners' conduct "cannot fairly be characterized as a wanton, reckless or malicious disregard of [respondents'] rights" (*id.* at 56a). It rejected petitioners' qualified-immunity defense solely on the ground that, "[r]egardless of intention, they violated [respondents'] basic constitutional right * * * [and] are charged with knowledge of established law" (*id.* at 74a).

More importantly, the precise limits of the doctrine of qualified immunity are not indentical for all officials, but vary "dependent upon the scope of discretion and responsibilities of the office." *Scheuer* v. *Rhodes*, 416 U.S. 232, 247 (1974). The scope of discretion and breadth of responsibility entrusted to the President, and to the advisors who assist and act for him, differ markedly from those of federal officials generally. The same reasons that support an absolute presidential immunity also indicate that, if the immunity is only qualified, these officials should not be required to disprove allegations of "malice" in personal damages actions. Such a qualified-immunity doctrine would impose a judicial check on intentional misconduct where the law is clearly established, but would avoid the burdens of a lengthy and disruptive hearing on allegations of malice that, as the court of appeals acknowledged, are easily made (Pet. App. 47a) but rarely sustainable (*id.* at 45a).

III.

The judicial decisions establishing constitutional standards for national-security surveillance, which were announced after the Halperin wiretap had been terminated, should not be applied retroactively to create personal damages liability for federal officers. See *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978).

First, as discussed above, the principles governing national-security surveillance were, at the least, unsettled at the time of the Halperin wiretap. Thus, these subsequent decisions "establish[ed] a new principle of law * * * by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). Moreover, these decisions were designed to avoid "potential invasions of privacy and protected speech * * * [and to provide] reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur." *United States* v. *United States District Court*, 407 U.S. 297, 317, 321 (1972). Since these decisions "look[] to a *future* free from such surveillance" (*Weinberg* v. *Mitchell*, *supra*, 588 F.2d at

278; emphasis added), retroactive application would not further their preventive purpose (see *Chevron Oil Co.* v. *Huson, supra*, 404 U.S. at 107).

Finally, it would be seriously inequitable to subject petitioners, by means of a retroactive application of the law, to personal damages liability for failing to conform their acts to constitutional guidelines that did not then exist (see *Chevron Oil Co.* v. *Huson, supra*, 404 U.S. at 107). "[T]he notion that persons have a right to fair warning of that conduct that will give rise to * * * [liability] is fundamental to our concept of constitutional liberty." *Marks* v. *United States*, 430 U.S. 188, 191-192 (1977). To create retroactively a constitutional tort action and hold petitioners personally liable for conduct that was not wrongful at the time, as the court below has done, "would be as inequitable as *ex post facto* criminal liability * * * [and] would be nothing short of punitive." *Weinberg* v. *Mitchell, supra*, 588 F.2d at 278.

ARGUMENT

I. THE PRESIDENT AND HIS CLOSEST ADVISORS ARE ABSOLUTELY IMMUNE FROM PERSONAL DAMAGES LIABILITY FOR DECISIONS MADE IN THE EXERCISE OF THE PRESIDENT'S OFFICIAL AUTHORITY

The courts below in this case have held, for the first time in the history of the Republic, that the President of the United States is subject to personal damages liability for official acts taken in his capacity as the Nation's Chief Executive. This unprecedented ruling is contrary to both the historical understanding of the absolute immunity inherent in the Office of the President under Article II of the Constitution and the compelling reasons of public policy in favor of such a privilege for the President. In light of the general analysis of immunity issues established by this Court and the fundamental principle of separation of powers, these considerations require reversal of the lower courts' unwarranted assertion of judicial authority in per-

sonal damages actions to engage in routine oversight of the President's official conduct.[17]

A. The President Of The United States Is Absolutely Immune From Civil Damages Liability Based On The Conduct Of His Office

The President of the United States is entitled to absolute immunity from damages liability arising out of his official acts. As the head of the Executive Branch of the federal government, the President, like the constitutional officers of the Legislative and Judicial Branches,[18] must be free both of the fear of personal liability and of undue interference by coordinate parts of the government. Absolute immunity is necessary to enable the President to discharge his Article II duties without regard to factors other than the best interests of the Nation and the dictates of his solemn oath of Office.[19]

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[17] In our view, this absolute immunity is fully applicable to a former President who is sued in a personal damages action for his official conduct while in office. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 448–449 (1977); *Bohmer* v. *Nixon*, Civil No. 75–4–T (S.D. Cal. June 16, 1976) (I J.A. 126); *Fonda* v. *Nixon*, Civil No. 73–2442–MML (C.D. Cal. May 23, 1974) (I J.A. 112); see also Pet. App. 53a (Gesell, J., concurring).

[18] See, *e.g.*, *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, No. 79–198 (June 2, 1980); *Butz* v. *Economou*, 438 U.S. 478, 508–512 (1978); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975).

[19] As this Court has recognized, absolute immunity for government officials is supported by the principle of separation of powers, since it helps "'to preserve the constitutional structure of separate, coequal, and independent branches of government * * *.'" *United States* v. *Gillock*, No. 78–1455 (Mar. 19, 1980), slip op. 9, quoting *United States* v. *Helstoski*, 442 U.S. 477, 491 (1979). "'In the American governmental structure * * * [this absolute immunity] serves the * * * function of reinforcing the separation of powers so deliberately established by the Founders.'" *Davis* v. *Passman*, 442 U.S. 228, 235 n.11 (1979), quoting *United States* v. *Johnson*, 383 U.S. 169, 178 (1966). See also *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878) ("One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict

The President must also be accorded an absolute immunity under the official immunity analysis established in this Court's precedents. In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Court, recognizing "that the law of privilege as a defense to damages actions against officers of Government has 'in large part been of judicial making' " (*id.* at 501–502, quoting *Doe* v. *McMillan*, 412 U.S. 306, 318 (1973), and *Barr* v. *Matteo*, 360 U.S. 564, 569 (1959)), set forth the following standard to govern the resolution of immunity issues (438 U.S. at 503, 506, 507, 508; footnote omitted):

> Having determined that the plaintiff is entitled to a remedy in damages for a constitutional violation, the court then must address how best to reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department. * * *
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> * * * * *
>
> [F]ederal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope * * * [and] that absolute immunity is essential for the conduct of the public business.
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> * * * * *
>
> Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations * * * there are some officials whose special functions require a full exemption from liability. * * * In each case, we have undertaken "a considered inquiry into the immunity

observance of this salutary rule"). And the possibility that presidential actions may be "'subject to judicial review in various circumstances'" does not suggest that such actions "'may * * * be made the basis for a civil * * * judgment against * * * [the President].'" *Doe* v. *McMillan*, 412 U.S. 306, 311–312 (1973), quoting *Gravel* v. *United States*, 408 U.S. 606, 624 (1972).

We note that, in the present case, the President was exercising his powers conferred by Article II of the Constitution in the critical areas of national defense and foreign affairs. See pages 37–38, *infra*; cf. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

> historically accorded the relevant official at common law and the interests behind it." [*Imbler* v. *Pachtman*, 424 U.S.] at 421.

The "special functions" of the presidency clearly call for a full exemption from liability for the President of the United States.

1. It has long been recognized that the President, in whom "[t]he executive Power [is] vested" (Art. II, § 1), is not personally accountable in judicial proceedings for the exercise of his executive powers. At the time of the First Congress, Vice President John Adams and Senator Oliver Ellsworth of Connecticut (who had been a member of the Constitutional Convention and later became Chief Justice of the United States) explained that no action could be instituted personally against the President because any such judicial authority would permit a single judge or court to "stop the whole machine of government." W. Maclay, *Sketches of Debate in the First Senate of the United States* 151-152 (Harris ed. 1880). Nor did they believe that this presidential immunity placed the "President * * * above the laws," since he was liable to impeachment; however, "you could only impeach him, and no other process whatever lay against him" (*id.* at 152). Similarly, as Mr. Justice Story later concluded:

> There are * * * incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose *his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and is accountable only to his country, and to his own conscience.* His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive.

III J. Story, *Commentaries on the Constitution of the United States* § 1563, at 418-419 (1833 ed.) (emphasis added).

The drafters of the Constitution were well aware of the potential for the new government to abuse the powers conferred upon it. They were also cognizant that the President, unlike the King of England, was not to be "above Justice" (II M. Farrand, *The Records of the Federal Convention of 1787*, at 65 (rev. ed. 1966) (remarks of George Mason)), that "the maxim would never be adopted here that the chief Magistrate could do no wrong" (*id.* at 66) (remarks of Elbridge Gerry), and that "some provision should be made for defending the Community ag[ain]st the incapacity, negligence or perfidy of the chief Magistrate" (*id.* at 65) (remarks of James Madison).[20] But, while the Framers acknowledged that "[t]his Magistrate is not the King * * * [t]he people are the King," they also recognized that "[w]hen we make him amenable to Justice however we should take care to provide some mode that will not make him dependent on the [other branches of government]" (*id.* at 69) (remarks of Gouverneur Morris).[21]

In the Framers' view, the power of impeachment and the political check of the election process would serve to restrain misfeasance in the exercise of presidential authority. For example, as Elbridge Gerry observed, "[a] good magistrate will not fear [impeachments]. A bad one ought to be kept in fear of them" (*id.* at 66). And Rufus King noted that the President "would periodically be tried for his behaviour by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it. * * * [T]he periodical responsibility to the electors" would assure his proper conduct of office (*id.* at 67–68). Alexander Hamilton summarized these principles by stating that "the two greatest securities [the people] can have for the faithful exercise of any delegated power [are], *first*, the restraints of public opinion * * *; and, *secondly*, the opportunity of discovering with facility

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[20] See also *The Federalist* No. 69 (A. Hamilton) at 41, 47 (1914 ed.); *The Federalist* No. 70 (A. Hamilton) at 55–56 (1914 ed.).

[21] See also *The Federalist* No. 71 (A. Hamilton) at 61 (1914 ed.) ("It is one thing to be subordinate to the laws, and another to be dependent on the [other branches of government]").

and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it. * * * '[T]he executive power is * * * confined * * *' [by] the jealousy and watchfulness of the people * * *." *The Federalist* No. 70 (A. Hamilton) at 55, 56-57 (1914 ed.). See also the comments of James Wilson, a delegate to the Constitutional Convention and later a Justice of this Court:

> To [the President] the provident or improvident use of [power] is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people. * * * [B]y continuing to be the man of the people, his investiture will be voluntarily, and cheerfully, and honorably renewed.
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> The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. * * *

I *The Works of James Wilson* 400 (Andrews ed. 1896); II *The Works of James Wilson*, *supra*, at 45.[22]

In addition to these constraints of impeachment, reelection, and public opinion, the Founding Fathers also erected a system of checks and balances to avert the ille-

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[22] As Wilson stated in the Pennsylvania Convention on the adoption of the Constitution:

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality * * *. Add to all this, that office is placed high, and is possessed of power far from being contemptible, yet not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment.

II J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (1836) (emphasis omitted).

gitimate exercise of presidential powers. In many of the most significant regards—the veto power (Art. I, § 7), the defense and war powers (Art. I, § 8; Art. II, § 2), the treaty power (Art. II, § 2), and the appointment power (*ibid.*)—the President and the Congress enjoy shared responsibilities. Through this device, the Constitution serves directly to forestall the wrongful use of the authority of the President. "It is far more wise to interpose checks upon the actual exercise of the power, than remedies to redress, or punish an abuse of it." III J. Story, *supra*, § 1509, at 362.

This constitutional plan—to prevent presidential abuses by means of checks and balances and to deter and punish such abuses through impeachment, the electoral process, and public opprobrium—was fully explained by Hamilton in his concluding discussion of the Executive in *The Federalist:*

> Does it [the structure and power of the executive department] also combine the requisites to safety, in a republican sense,—a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; from the election of the President once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people?

The Federalist No. 77 (A. Hamilton) at 97 (1914 ed.). Nothing in the entire course of these deliberations suggests in any way that the President was also to be

liable to suit for money damages arising out of the conduct of his Office. In light of the extensive consideration given to the issue of potential presidential misconduct and the settled doctrine in England that the King was not subject to judicial proceedings, it is inconceivable that the Framers intended by their silence to assent to personal damages actions against the President based on the exercise of his official duties. Rather, the manifest inference, in line with the conclusions of Vice President Adams and Senator Ellsworth in the First Senate, and of Mr. Justice Story, is that the Constitution does not sanction such suits.[23]

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[23] As historical support for its conclusion that "[t]he constitutional scheme betrays no indication that any kind of immunity was intended for the President" (Pet. App. 42a) and that the President is therefore amenable to personal damages actions for his official conduct, the court of appeals (*id.* at 42a–43a n.129) relied almost exclusively on various statements made by Charles Pinckney. However, in citing Pinckney for the assertion that "[n]o privilege of this kind was intended for your Executive * * *[,]" the court of appeals misconstrued Pinckney's remarks.

In February 1800, a newspaper in Philadelphia published an article about a bill pending in the Senate. Some Senators objected to the story, and a motion was introduced to have the Committee of Privileges inquire into its source. 10 Annals of Cong. 63, 68 (1800). Pinckney opposed the motion, stating that there is not "a word or a sentence in the whole [of the Constitution] that can by any possible construction be made to mean that for any libels or printed attack on the public conduct or opinions of either House of Congress, or of any of its members, that their privilege shall extend to ordering the persons charged with the offence before them, and imprisoning them at their will" (*id.* at 71; see also *id.* at 72). In aid of his position, Pinckney argued that the sedition statute, which made it a criminal offense to libel the President or either House of Congress, would have been unnecessary if Congress possessed the asserted power. In this connection, Pinckney noted, in the passage selectively quoted by the court of appeals (*id.* at 74; emphasis added):

> [L]et us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. Why should the individual members of either branch, or either branch itself, have more privileges than him? He is himself, as far as his qualified negative goes, a branch of the Legislature; he is, besides, your Executive, he is the sword

2. In view of these authorities, the absence of personal damages actions against the President for his official conduct is not surprising. This dearth of litigation bespeaks the common and settled understanding that the President is not subject to monetary liability. Moreover, on the infrequent occasions when such litigation has been commenced, the federal courts have consistently ruled that the President cannot be held personally accountable for damages. See *Reese* v. *Nixon*, 347 F. Supp. 314, 316-317 (C.D. Cal. 1972), aff'd in pertinent part, No. 72-3070 (9th Cir. May 3, 1974) (I J.A. 95-97); *Bohmer* v. *Nixon*, Civil No. 75-4-T (S.D. Cal. June 16, 1976) (I J.A. 122-126); *Davis* v. *Nixon*, Civil No. 73-1520-LTL(G) (C.D. Cal. June 18, 1974) (I J.A. 114-121); *Fonda* v. *Nixon*, Civil No. 73-2442-MML (C.D. Cal. May 23, 1974) (I J.A. 98-113). See also *Barr* v. *Matteo*, 360 U.S. 564, 583 (1959) (Warren, C.J., dissenting) (absolute immunity of officials who were appointed by and report to the President "partakes of presidential immunity"); *Mellon* v. *Brewer*, 18

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of the law, *and does he possess any privileges like these? If a man meets him walking alone in the streets and insults him, or if one of ruffian manners should enter his house, and even abuse him there, has your President any privileges like these? Can he commit and imprison without a trial? No sir, he must resort to the laws for satisfaction*, where the person charged with outrage will be heard, and where each party will have justice done them, by men who ought to be so impartially summoned as that no undue bias will be found, when they come to decide. *No privilege of this kind was intended for your Executive*, nor any except that which I have mentioned for your Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privileges to what was necessary, and no more.

Thus, the privilege addressed by Pinckney was not a presidential immunity from damages actions (or, for that matter, any other privilege or immunity incident to the presidency), but instead concerned the prerogative of the President summarily to charge, convict, and punish for an offense without resort to judicial proceedings. Hence, the court of appeals incorrectly read Pinckney's comments to militate against an absolute immunity for the President.

F.2d 168, 172 (D.C. Cir.), cert. denied, 275 U.S. 530 (1927) (publication of allegedly defamatory "official communication or report by the President would not have formed the basis of an action for libel").

3.a. In addition to its historical and precedential support, this doctrine—that the President is absolutely immune from personal damages liability for his official acts—also rests on compelling grounds of public policy, reinforced by the separation of powers (see note 19, *supra*). Damages actions against the President challenging the legality of his official acts would constitute a substantial intrusion into the President's constitutional responsibilities. The risk of personal liability would serve to inhibit the fearless and decisive exercise of presidential authority, and "the public trust [placed in the President] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler* v. *Pachtman*, 424 U.S. 409, 424-425 (1976).

The federal executive power is vested in whole in the President, and he is charged with the faithful execution of his Office and the preservation and defense of the Constitution. See Art. II, § 1; see also, *e.g.*, *Myers* v. *United States*, 272 U.S. 52, 117, 151, 163-164 (1926). As the Nation's Chief Executive, the President is repeatedly called upon to make discretionary decisions on issues that affect the lives of virtually every American citizen. Because the easier or less controversial matters are disposed of at a lower level, it is the rare presidential decision that does not involve difficult choices among reasonable alternatives or adversely affect some segment of the Nation.

Undeniably, the President's discharge of these "grave, complex and unique responsibilities" (Pet. App. 53a (Gesell, J., concurring)) should be motivated solely by considerations of the public welfare, not by fear of personal liability in damages. Yet any concern for the financial security of his family and himself would divert the President's attention from the competing public policies on which his decisions should be made; especially in light of the vast

potential liability confronting him for virtually every presidential decision, it is unavoidable that (in the absence of an absolute immunity from damages) such personal considerations would intrude themselves at least in some instances. As Judge Learned Hand explained in *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), "to submit * * * [the President] to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Thus, "[t]he societal interest in providing * * * [the President] with the maximum ability to deal fearlessly and impartially with * * * [the duties of his Office is] an acceptable justification for official immunity." *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979) (footnote omitted).[24]

Furthermore, the President is a natural target for those dissatisfied by the outcome of his decisions. The matters that come to the attention of the President are necessarily the kind that, in difficulty and importance, are likely to "arouse the most intense feelings." *Butz* v. *Economou*,

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[24] The immunity of the President is because of his official position. He is a great and necessary part of our government. The legislative branch is composed of many members, while the judicial branch is a collective body and it would be difficult to injure either numerically so as to interfere with the administration of the Government. But it is wholly different with the executive branch. One man constitutes all there is of that, and upon him the Constitution has placed many great and important duties, and these duties are constant. He does not sit in authority at stated intervals like Congress and the courts. There is no recess in the discharge of his official duties. From the time he takes the oath until his office expires there is a continuity of official obligations and duties, sacredly and solemnly imposed upon him by the Constitution. Anything which impairs his usefulness in the discharge of his duties, however slight, to that extent impairs the operation of the Government.

* * * * *

The President is the highest official of the Government and by the express terms of the Constitution is the executive branch of the Government. The language of the Constitution is, "*The*

438 U.S. 478, 509 n.36 (1978), quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); see also *Stump* v. *Sparkman*, 435 U.S. 349, 364 (1978); *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 425; *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 348 (1871). It is all too easy for disgruntled individuals or groups, simply by alleging an "unconstitutional animus" (*Butz* v. *Economou*, *supra*, 438 U.S. at 512), to carry their disagreement from the political arena to the courtroom in an effort to influence or harass the President, to gain public attention for their cause or position, to improve their situation by means of a negotiated settlement, or to further their self-interest in some other way. As Judge Gesell noted, "many of these cases are political in character [and] involve highly controversial acts" (Pet. App. 52a). The prospect of a burgeoning number of lawsuits against the President in his individual capacity militates strongly in favor of absolute immunity.[25]

Of course, there is also an undeniable public interest in avoiding abuses of presidential authority.[26] But, as the

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executive power shall be vested in a President of the United States of America." That means all the executive power of the government, without limitation or reserve, is vested in the President, and it is only because the President is clothed with so extraordinary a power that he can be said to be exempt from the operations of the law.

II D. Watson, *The Constitution of the United States* 1023–1024, 1025–1026 (1910).

[25] See Pet. App. 51a (Gesell, J., concurring) ("with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts"). See also, *e.g.*, *Nixon* v. *Fitzgerald*, petition for cert. pending, No. 79–1738 (filed May 2, 1980); *Clark* v. *United States*, 481 F. Supp. 1086 (S.D.N.Y. 1979), stay granted, Nos. 80–6016, 80–6024 (2d Cir. June 24, 1980).

[26] As Judge Hand explained in *Gregoire* v. *Biddle*, *supra*, 177 F.2d at 581:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good,

court of appeals recognized (Pet. App. 45a), the occasions of such abuse are likely to be rare. Moreover, there exist means wholly apart from damages actions to deter the improper exercise of presidential authority. The momentous nature of his undertaking, the visibility of his position, and the solemn oath to which he swears (as prescribed in the Constitution itself (Art. II, §1)), all work to impress upon the President the grave responsibilities of his Office and the public trust he bears. Beyond that, "there are obvious political checks against an incumbent[ ] [President's] abuse of * * * [his position]." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 448 (1977). For instance, the system of checks and balances, including the process of congressional oversight, acts to constrain and to detect the illegitimate uses of the President's powers.[27] As the ultimate measure, Congress can impeach and remove a Presi-

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> should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried * * *. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

See also *Butz* v. *Economou*, *supra*, 438 U.S. at 529 (Rehnquist, J., dissenting) ("[T]here are inevitable trade-offs in connection with any doctrine of official liability and immunity. * * * [While] an occasional failure to redress a claim of official wrongdoing would result from the doctrine of absolute immunity * * *, it * * * [is] a lesser evil than the impairment of the ability of responsible public officials to govern.").

[27] See *United States* v. *Brewster*, 408 U.S. 501, 517–518, 523 (1972):

> [U]nlike England with no formal, written constitutional limitations on the monarch, [the authors of our Constitution] defined limits on the co-ordinate branches, providing other checks to protect against abuses of the kind experienced in that country.
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> The check-and-balance mechanism * * * [has discouraged] abuses of power * * * [and has not] tolerated them long when they arose.

Congress has recently demonstrated its capacity to oversee the actions of the Executive Branch, including executive actions in the areas of

dent who is unfaithful to the duties of his Office.[28] And a President who has been convicted upon impeachment can be criminally prosecuted for any such offenses (Art. I, § 3).[29] In addition, the critical scrutiny received by a Presi-

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national security and foreign affairs. See, *e.g.*, Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783; War Powers Resolution, 50 U.S.C. 1541 *et seq.*; *Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) (Church Committee).

[28] The impeachment power provides a substantial safeguard. Article II, paragraph (2) of the articles of impeachment recommended by the House Judiciary Committee against petitioner Nixon was based precisely upon the acts alleged by respondents in this suit. See H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146-150 (1974).

[29] In holding that the President is entitled to only a qualified immunity, the court of appeals construed the Impeachment Clause to "reveal[ ] that incumbency does not relieve the President of the routine legal obligations that confine all citizens" (Pet. App. 43a, quoting *Nixon* v. *Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (en banc)). But the Clause does not support the court's conclusion. The cited provision that the official "convicted [upon impeachment] shall * * * be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law," is limited to criminal prosecutions and was designed to make clear that a prosecution following impeachment and conviction would not be barred by principles of double jeopardy. See, *e.g.*, II J. Story, *Commentaries on the Constitution of the United States* §§ 780, 781 (1833 ed.); see also *United States* v. *Isaacs*, 493 F.2d 1124, 1142 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *Nixon* v. *Sirica*, *supra*, 487 F.2d at 757 (MacKinnon, J., concurring in part and dissenting in part). At all events, the applicability of the Impeachment Clause to federal judges has not foreclosed recognition of an absolute judicial immunity from damages liability, and no different conclusion should obtain in the case of the President.

In rejecting an absolute presidential immunity, the court of appeals also stressed the lack of any express immunity for the Executive Branch in the Constitution (Pet. App. 42a-43a). This line of reasoning was rejected by the Court in *United States* v. *Nixon*, 418 U.S. 683, 705-706 n.16 (1974), quoting *Marshall* v. *Gordon*, 243 U.S. 521, 537 (1917) ("the silence of the Constitution on this score is not dispositive. '* * * [T]hat which [is] reasonably appropriate and relevant to the exercise of a granted power [is] to be considered as accompanying the grant' "). We also note that the only express constitutional immunity for governmental officers—the Speech or Debate Clause (Art. I,

dent during the electoral process acts to curb the occurrences of presidential misconduct; this factor has unique application to the President, who is the only elected official in the Executive Branch of the federal government. So, too, the President's role as the leader of his political party adds further effect to the constraints imposed through the electoral process. Moreover, the force of public opinion and the vigilance of the news media operate to deter and apprehend a President about to forsake the honor and confidence reposed in him.[30] Finally, the existence of judicial review of presidential actions[31] serves to contain and correct the unauthorized exercise of the President's powers.

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§ 6)—was grounded in the long and difficult development of legislative privilege in England. See *United States* v. *Johnson*, 383 U.S. 169, 177–183 (1966). In light of this history, the Framers perceived the need expressly to preserve congressional independence by "protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary" (*id.* at 179); the absence of a similar background regarding the other two branches of government elucidates the omission of an express immunity provision to safeguard their independence. In any event, despite the lack of any specific constitutional provision, absolute immunities for judges and prosecutors are well-established. See *Butz* v. *Economou*, 438 U.S. 478 (1978); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871). Indeed, this Court in *Butz* and, at least by implication, in *Imbler*, has upheld absolute immunities for certain Executive Branch officials in the federal government. See also *Yaselli* v. *Goff*, 275 U.S. 503 (1927), aff'g 12 F.2d 396 (2d Cir. 1926). The court of appeals' reasoning in this regard is contrary to these settled principles of absolute immunity.

[30] See *United States* v. *Brewster*, *supra*, 408 U.S. at 523 & n.16:

> [U]nfettered debate in an open society with a free press * * * [has discouraged] abuses of power * * * [and has not] tolerated them long when they arose. * * * [An important practical consideration] is the omnipresence of the news media whose traditional function and competitive inclination afford no immunities to reckless or irresponsible official misconduct.

[31] See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

Because of the unique responsibilities and prominence of the presidency, all of these considerations have special bearing with respect to the Office of the President. As discussed above (see pages 21–24, *supra*), the Framers of the Constitution, after thorough consideration focusing specifically on the presidency, concluded that the foregoing safeguards were sufficient to channel the exercise of presidential authority. As they recognized, "[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting *** abuses." *Tenney* v. *Brandhove*, 341 U.S. 367, 378 (1951). Damages actions against the President are an unnecessary additional deterrent, whose benefits are far outweighed by the costs they would impose on the proper functioning of the presidency, and, in turn, on the Nation.

b. It is also evident that a qualified or conditional immunity for the President would be seriously inadequate and would thereby "disserve the broader public interest * * * [in the] vigorous and fearless performance of the * * * [President's] duty * * *." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427. "If the mere allegation that a * * * [presidential] act was undertaken for an unworthy purpose would lift the protection of the * * * [immunity], then the * * * [immunity] simply would not provide the protection historically undergirding it." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 508–509 (1975). To the extent that only a qualified immunity is available to the President, the allegations of improper motive would have to "be inquired into * * * [and the President] would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at 354.

In our view, recognition of only a qualified presidential privilege would lead to an extreme and unwarranted interference with the decision-making process of the Executive Branch and the execution of presidential duties under Article II of the Constitution. As discussed below (see pages 50–51, 60–61, *infra*), a qualified immunity rests on

the reasonableness of the decision and the good faith with which it was made. Thus, the rule of law adopted by the court of appeals, by requiring the President routinely to explain and justify his decisions in response to civil damages suits, would result in recurring judicial oversight of the President's discretionary actions. Indeed, the court of appeals recognized that such review would occur and that, at least with respect to the good-faith element of the immunity defense, would ordinarily necessitate a full trial (Pet. App. 38a–40a). This excessive intrusion into the very Office of the President is unparalleled in our Nation's history and should be scrupulously avoided. See *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 499–501 (1866); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 610 (1838); see also *Committee to Establish the Gold Standard* v. *United States*, 392 F. Supp. 504, 506 (S.D.N.Y. 1975); *Meyers* v. *Nixon*, 339 F. Supp. 1388, 1391 (S.D.N.Y. 1972); *Atlee* v. *Nixon*, 336 F. Supp. 790, 792 (E.D. Pa. 1972); *San Francisco Redevelopment Agency* v. *Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971); *Suskin* v. *Nixon*, 304 F. Supp. 71, 72–73 (N.D. Ill. 1969); *Trimble* v. *Johnston*, 173 F. Supp. 651, 652–654 (D.D.C. 1959).

A qualified immunity is rendered further inadequate by the litigation process itself. In order to defend himself, the President would generally be forced to reveal not only the intimate details of executive decision-making but also the confidential and highly sensitive information on which he based his actions. This is directly at odds with the "presumptive privilege for Presidential communication" recognized in *United States* v. *Nixon*, 418 U.S. 683, 708 (1974). As the Court there explained (*id.* at 705–706, 708, 715; footnotes omitted):

> [One] ground [supporting the privilege] is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detri-

> ment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.
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> The expectation of a President to the confidentiality of his conversations and correspondence * * * [is premised in part on] the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.* * *
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> It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.

See also Pet. App. 51a, 53a (Gesell, J., concurring). In addition to this sweeping breach of presidential confidentiality, the release of such information would often be prohibited by law or otherwise contrary to the national interest. Cf. *United States* v. *Reynolds*, 345 U.S. 1 (1953).[32] And beyond these disclosure concerns, the complexity and gravity of presidential responsibilities, and the pressures

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[32] Moreover, in the case of a former President, as here, the relevant materials simply may not be available for use in the lawsuit. See II J.A. 7.

The Fourth Circuit has recently held that a government official personally sued for damages must bear the loss if his defense rests on

and urgency under which they are exercised, may be impossible to convey to a lay jury.

> The presentation of such issues in a * * * [personal damages] action often would require * * * the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest * * * [President] would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a * * * [President] inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a * * * [President] responsible annually for hundreds of * * * [major decisions].

Imbler v. *Pachtman*, *supra*, 424 U.S. at 425–426. See also Pet. App. 52a (Gesell, J., concurring) ("these cases * * * will necessarily embroil juries in passing upon the intricacies of executive decisionmaking").

Finally, the protections necessary for the Office of the President "'would be of little value if * * * [the President] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against * * * [him] based upon a jury's speculation as to motives.'" *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979), quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951). The President should not be put to the risk of convincing a jury several years later, in the aftermath of subsequent national events and possible political fervor, that he acted reasonably and in good faith at the time. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 425–426. See also Pet. App. 52a (Gesell, J., concurring) ("many of these cases are political in character [and] involve highly con-

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materials that cannot be disclosed because of military and state secrets. *Farnsworth Cannon, Inc.* v. *Grimes*, No. 79–1260 (4th Cir. June 12, 1980), slip op. 10–16. Under this analysis, it would appear that the President would lose his qualified immunity by default whenever, as is likely, the information necessary to establish that defense is withheld on grounds of government privilege.

troversial acts"). "'In times of political passion, dishonest or vindictive motives are readily attributed to * * * [presidential] conduct and as readily believed.'" *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 509, quoting *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 378. "The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial" (*Imbler* v. *Pachtman*, *supra*, 424 U.S. at 419 n.13), and "in the face of [a mistake] an official may later find himself hard put to it to satisfy a jury of his good faith" (*Gregoire* v. *Biddle*, *supra*, 177 F.2d at 581).

Likewise, the burdens of such litigation—the time, the expense, the personal anxiety, and the unavoidable disruption of official duties—should not be imposed upon the President. "'[A] private civil action * * * creates a distraction and forces * * * [the President] to divert * * * [his] time, energy, and attention from * * * [his presidential] tasks to defend the litigation.'" *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, No. 79-198 (June 2, 1980), slip op. 13, quoting *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 503; see also *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 425. As Thomas Jefferson explained during his presidency, "[t]he Constitution enjoins [the President's] constant agency in the concerns of six millions of people. Is the law paramount to this, which calls on him on behalf of a single one?" II D. Watson, *The Constitution of the United States* 1014 (1910).[33] Accordingly, "[t]o preserve * * * [presidential] independence * * * [the President] '* * * should be protected not only from the consequences of litigation's results but also from the burden of defending * * * [him-

[33] As this Court recently noted in *Herbert* v. *Lando*, 441 U.S. 153 (1979), a plaintiff who bears the burden of proving malice must be given a fair opportunity to question the defendant to develop the relevant evidence. The same rule would presumably apply when it is the defendant who bears the burden of proof with respect to his subjective good faith (see *Gomez* v. *Toledo*, No. 79-5601 (May 27, 1980)) and the plaintiff "make[s] 'some showing' of malice to state a genuine issue as to the *bona fides* of the official's [qualified] immunity defense" (*Chagnon* v. *Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980), slip op. 29-30). Thus, a rule limiting the President to a qualified immunity might re-

self].'" *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, *supra*, slip op. 12, quoting *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967), and *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 376; see also *Hutchinson* v. *Proxmire*, 443 U.S. 111, 123 (1979).[34]

4. The foregoing considerations are especially apt with regard to the areas of presidential responsibility involved in the present suit—national security and foreign affairs. The President's broad powers in these matters—matters that involve "important, complicated, delicate and manifold problems" (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936))—flow directly from Article II of the Constitution and are beyond dispute. The President is "both * * * [the] Commander-in-Chief and * * * the Nation's organ for foreign affairs * * *." *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship*

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quire the President to attend a deposition or answer interrogatories in a private civil suit, at the expense of his duties as Chief Executive, or risk the imposition of sanctions, including a default judgment. See Fed. R. Civ. P. 37(b). Indeed, the court of appeals candidly acknowledged that "[q]uestions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved" (Pet. App. 38a). This disruption of daily activities might be justified when dealing with a subordinate executive official, but it should not be permitted in the case of the President.

[34]The Court's expectation in *Butz* v. *Economou* that "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading" and that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits" (438 U.S. at 507, 508) has proven to be a false hope. See *Hanrahan* v. *Hampton*, No. 79-912 (June 2, 1980), slip op. 5-7 (Powell, J., concurring in part and dissenting in part); see also Pet. App. 40a n.121; *id.* at 51a-53a (Gesell, J., concurring). Indeed, the court of appeals in this case conceded (*id.* at 38a) that pretrial procedures often are not suitable for resolving the validity of a qualified-immunity defense. Despite its recognition that personal damages actions would impose "extraordinary practical difficulties * * * [on] a President" (*id.* at 47a), the court of appeals could only exhort that district courts "carefully examine any pretrial claim [for summary judgment]" (*id.* at 38a) and "be sensitive" to these problems in overseeing the course of the litigation (*id.* at 47a). As Judge Gesell rightly observed (*id.* at 51a), this limited approach "extend[s] no more protec-

Corp., 333 U.S. 103, 111 (1948). "In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations." *New York Times Co.* v. *United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring); see also *id.* at 741 (Marshall, J., concurring); *id.* at 756-758 (Harlan, J., dissenting); *id.* at 761 (Blackmun, J., dissenting). "[T]he President of the United States has the fundamental duty, under Art. II, §1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. * * * We recognize * * * the constitutional basis of the President's domestic security role * * *." *United States* v. *United States District Court*, 407 U.S. 297, 310, 320 (1972). In exercising this constitutional authority, the President must be ever mindful of the vital duty with which he is charged:

> It has been said that "[t]he most basic function of any government is to provide for the security of the individual and of his property." *Miranda* v. *Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting). And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered. As Chief Justice Hughes reminded us in *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941):
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> > "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

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tion to top federal officials than is afforded by the normally applicable summary judgment principles" and "substantially undermines, if not destroys, the immunity doctrine." Contrary to the Court's admonition in *Butz*, "trial judges will almost automatically have to send such cases to full trials on the merits" (Pet. App. 52a) (Gesell, J., concurring). See also *Nixon* v. *Fitzgerald*, petition for cert. pending, No. 79-1738 (filed May 2, 1980) (trial necessary to determine qualified immunity of President for refusal to order the rehiring of government employee).

United States v. *United States District Court*, *supra*, 407 U.S. at 312.

Nor can it be doubted that secrecy is essential to the proper execution of these presidential powers.

> [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

New York Times Co. v. *United States*, *supra*, 403 U.S. at 728-730 (Stewart, J., concurring). As the Court has recently observed, "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, Nos. 78-1871, 79-265 (Feb. 19, 1980), slip op. 3 n.3. See also *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, *supra*, 333 U.S. at 111; *United States* v. *Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 319-321; *Totten* v. *United States*, 92 U.S. (2 Otto) 105 (1875).[35]

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[35] President Washington explained this need for secrecy in declining the request of the House of Representatives to produce materials relating to the Jay Treaty:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent

The national interest in the President's successful conduct of this country's defense and foreign affairs strongly supports an absolute presidential immunity from personal damages liability. Least of all in these critical areas should there be countenanced even the slightest inhibition on the vigorous and resolute discharge of the President's constitutionally based responsibilities. Likewise, it is in precisely these areas that the judiciary should be most unwilling, in the guise of deciding monetary liability, to undertake review of the President's discretionary decisions. It is also in these areas that litigation on the reasonableness and good faith of the President's actions would most surely both endanger the national welfare through the disclosure of confidential information and be beyond the ken of the trier of fact. And there is in these volatile areas a substantial risk of damages actions by those dissatisfied, for whatever reason, with the President's determinations.

5. The grounds offered by the court of appeals to afford only a qualified presidential immunity are unpersuasive.

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reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

I J. Richardson, *Messages and Papers of the Presidents* 194–195 (1896), quoted in *United States* v. *Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 320–321. Indeed, the Framers of the Constitution viewed the President's ability to maintain secrecy and confidentiality regarding foreign affairs and national security as one of the most beneficial aspects of his Office. See II M. Farrand, *supra*, at 538 (remarks of James Wilson); *ibid.* (remarks of Roger Sherman); IV M. Farrand, *supra*, at 17 (remarks of George Mason); *The Federalist* No. 64 (J. Jay) at 12–13 (1914 ed.); *The Federalist* No. 70 (A. Hamilton), *supra*, at 50; *The Federalist* No. 75 (A. Hamilton) at 83 (1914 ed.); III J. Story, *supra*, §§ 1504 at 357, 1505 at 358, 1507 at 360.

The court first reasoned that the existence of a qualified immunity would not "hinder effective governance of the nation * * * [because] suits that may successfully be pursued against a President will be quite rare" (Pet. App. 45a; footnote omitted). As previously discussed, however (see pages 26–28, 32–37, *supra*), there is in fact every reason to believe that personal damages actions against the President will inhibit the execution of his responsibilities and thereby impair the essential operation of government. Moreover, in striking the balance between competing public policies, the dearth of meritorious cases against the President militates in favor of, rather than against, an absolute presidential immunity. See *Gregoire* v. *Biddle*, *supra*, 177 F.2d at 581. At all events, it is the prospect and vexation of these suits, not just their actual success, that serves to chill the fearless and resolute exercise of presidential authority.

The court of appeals also concluded that the President is entitled to no greater immunity than the *Butz* good-faith defense generally enjoyed by executive officers because he cannot be set "apart from * * * other high Executive officials" (Pet. App. 42a) and "no defensible distinction can be made between the President and other high Executive officers for immunity purposes" (*id.* at 48a n.144). However, as already discussed (see pages 25–38, *supra*), the President does occupy a position far different from those held by his subordinates in the Executive Branch. As the highest elected official in the Nation and the only constitutional officer in the Executive Branch, the Chief Executive possesses powers and responsibilities that are unparalleled in the government, especially in the areas of national security and foreign affairs. The complexity, importance, and controversial nature of the issues that come to the President's attention; the commitment of the full executive power to a single individual, the express duties imposed on him by the Constitution, and the manifold matters, both domestic and foreign, that require his personal involvement; his unique status as the only official in the Executive Branch who is chosen by and directly accountable to

the electorate—these and like considerations serve to distinguish the Office of the President.[36]

In rejecting an absolute immunity, the court of appeals further observed that *Butz* v. *Economou* does not permit any greater protection for the President than the qualified immunity afforded the governor of a state in actions under 42 U.S.C. 1983 (Pet. App. 48a n.144, citing *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974)). But, once again, this line of argument ignores the singular role of the Office of the President. The authority and duties of a governor fall far short, in both kind and degree, of those of the President. In particular, a governor has no responsibility with regard to the critical areas of national defense and foreign policy. See *United States* v. *Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 316. As the Court recognized in *Butz* v. *Economou*, the governor of a state is analogous not to the President but to "the head of a federal department" (438 U.S. at 501; see also *id.* at 500-501 n.28). Moreover, a governor is not a federal official and does not exercise powers delegated by the Constitution. Hence, judicial oversight of the performance of his functions does not threaten an interference with constitutional obligations or present problems implicating the separation of powers.[37]

Finally, the court of appeals incorrectly viewed an absolute presidential immunity as inconsistent with "our tra-

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[36] Courts have long been sensitive to the special role of the President and have endeavored, to the extent they have jurisdiction over him at all, to safeguard the President from the burdens and distractions of litigation in which he is named as a defendant. See page 33, *supra*; see also *United States* v. *Nixon*, *supra*, 418 U.S. at 715; *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587, 606 (D.C. Cir. 1974); *Nixon* v. *Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc). Cf. *United States* v. *Burr*, 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C.D.Va. 1807).The same concern justifies an absolute presidential immunity in damages actions.

[37] By the same token, the court of appeals' analogy between the President and a state governor fails to appreciate that Congress, through the federal system of checks and balances, its investigative authority, and its impeachment power, provides alternative restraints on the President that are absent with respect to a governor. In addi-

dition of equal justice under law" (Pet. App. 49a) and the maxim that "'[n]o man in this country is so high that he is above the law'" (*ibid.*, quoting *United States* v. *Lee*, 106 U.S. (16 Otto) 196, 220 (1882)). It has never been thought that judicial officers, prosecuting attorneys, and state legislators were placed "above the law" because of their absolute immunity. See, *e.g.*, *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, *supra*; *Butz* v. *Economou*, *supra*, 438 U.S. at 508–517; *Stump* v. *Sparkman*, *supra*; *Imbler* v. *Pachtman*, *supra*. The immunity "'is not for the protection or benefit of a malicious or corrupt * * * [official], but for the benefit of the public'" (*Imbler* v. *Pachtman*, *supra*, 424 U.S. at 418 n.12, quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); see also *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 502, quoting *United States* v. *Brewster*, 408 U.S. 501, 507 (1972)). "The privilege is not a badge or emolument of exalted office" (*Barr* v. *Matteo*, 360 U.S. 564, 572 (1959) (plurality opinion)), but instead rests on the acknowledged necessity that the legal system must "reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department" (*Butz* v. *Economou*, *supra*, 438 U.S. at 503).

The fact that the principle of separation of powers and the "special functions" of the presidency (*Butz* v. *Economou*, *supra*, 438 U.S. at 508) give rise to an absolute presidential immunity does not "mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities * * * [and] to the performance of

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tion, the important national political checks applicable to a President are also less effective in the case of a governor. "The President is the only nationally elected officer, and thus, at least arguably, our most politically accountable official." Cutler & Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395, 1411 (1975). For these reasons, "the assumption that the Federal Government could keep its own officers under control [even without constitutional tort actions]" (*District of Columbia* v. *Carter*, 409 U.S. 418, 429–430 (1973)) serves to distinguish the immunity appropriate for the President and that due a state governor.

duties under that Article." *United States* v. *Nixon*, *supra*, 418 U.S. at 715.[38] The threat of personal liability for the President, and the routine judicial oversight of his decisions, would dangerously inhibit the vigorous and decisive discharge of his constitutional duties and unduly intrude into his decision-making processes. It would also impair the national interest to burden the President's uniquely valuable time and attention with the defense of such personal damages suits and to compel him, at the risk of individual liability, to explain and justify his actions. Accordingly, both the Constitution and important considerations of public policy require that the President be accorded an absolute immunity from damages liability, in order that he may exercise the duties of his Office "without harassment or intimidation" (*Butz* v. *Economou*, *supra*, 438 U.S. at 512) and may pursue the objectives of his administration "sanctioned by the electorate" (*Elrod* v. *Burns*, 427 U.S. 347, 367 (1976) (plurality opinion)).

B. Absolute Presidential Immunity Extends To Those Who Act On The President's Behalf At His Direction

If, as we urge, the Court recognizes the existence of an absolute presidential immunity from damages liability, that immunity should extend to those who act on the President's behalf at his direction. Since President Nixon "authorized this entire program" (I J.A. 212), and since petitioners Kissinger, Mitchell, and Haldeman "were operating under [his] specific authority and were carrying

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[38] The Framers of the Constitution were well aware of both the potential dangers presented by the Executive and the inviolability of the King under the English legal system. See pages 21–24, *supra;* see also *The Federalist* No. 69 (A. Hamilton), *supra*, at 41, 47. In light of that awareness, they expressly provided that the President "would be amenable to personal punishment and disgrace" through impeachment, removal, and criminal prosecution (*id.* at 47). An absolute presidential immunity, therefore, does not elevate a President above the law but instead recognizes his accountability to the law in a way that also allows the uninhibited conduct of his Office.

out [his] express orders" (I J.A. 48–49), they are entitled to a derivative absolute immunity in this case.

The responsibilities of the presidency are extraordinarily numerous, complex, and far-reaching. Of necessity, therefore, the President must delegate to others many of the tasks and functions relating to his Office. "[I]t is literally impossible, in view of the complexities of the modern * * * [presidency], for * * * [the President] to perform * * * [his duties] without the help of aides and assistants * * *." *Gravel* v. *United States*, 408 U.S. 606, 616 (1972). "[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Buckley* v. *Valeo*, 424 U.S. 1, 135 (1976), quoting *Myers* v. *United States*, 272 U.S. 52, 117 (1926); see also *Barr* v. *Matteo*, 360 U.S. 564, 573 (1959) (plurality opinion). In view of this fact of governmental life, it must be recognized "that the day-to-day work of such aides is so critical to the * * * [President's] performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the * * * [absolute presidential immunity] will inevitably be diminished and frustrated." *Gravel* v. *United States*, *supra*, 408 U.S. at 616–617. Accordingly, "for the purpose of construing the privilege [the President] and his aide[s] are to be 'treated as one'" (*id.* at 616, quoting *United States* v. *Doe*, 455 F.2d 753, 761 (1st Cir. 1972)), and thus the absolute presidential immunity "applies not only to * * * [the President] but also to his aides insofar as the conduct of the latter would be a protected * * * act if performed by the * * * [President] himself" (408 U.S. at 618).

This concept of derivative immunity is well established in the context of legislative immunity under the Speech or Debate Clause. See *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 507 (1975) (chief counsel of Senate subcommittee); *Doe* v. *McMillan*, 412 U.S. 306, 312, 320 (1973) (clerk, staff director, and counsel of House committee, consultant and investigator for the committee, and Superintendent of Documents and Public Printer); *Gravel* v. *United States*, *supra* (personal legislative assistant to senator); see also *Butz* v. *Economou*, *supra*, 438

U.S. at 496 n.23. The Court has also recognized the doctrine of derivative immunity for officials of the Executive Branch. See *Doe* v. *McMillan*, *supra*, 412 U.S. at 323 ("the Printing Office is immune from suit when it prints for an executive department * * * only * * * to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents"). And the courts of appeals have likewise applied the principle in a variety of circumstances. See, *e.g.*, *Chagnon* v. *Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980), slip op. 10-11 n.9 (FBI agents conducting a national-security wiretap at direction of Attorney General); *Ashbrook* v. *Hoffman*, 617 F. 2d 474 (7th Cir. 1980) (partition commissioners appointed by state court in divorce proceeding); *Green* v. *DeCamp*, 612 F.2d 368 (8th Cir. 1980) (counsel for state legislative committee); *Spaulding* v. *Nielsen*, 599 F.2d 728 (5th Cir. 1979) (federal probation officers who prepared presentence report at the direction of the court); *Kermit Construction Corp.* v. *Banco Credito Y Ahorro Ponceno*, 547 F.2d 1 (1st Cir. 1976) (receiver appointed bs state court); *Berndtson* v. *Lewis*, 465 F.2d 706 (4th Cir. 1972) (Navy captain acting at designation of Secretary of the Navy and Vice Admiral in charge of naval personnel); *Heine* v. *Raus*, 399 F.2d 785 (4th Cir. 1968) (CIA employee acting at instructions of CIA Director); but see *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1216 (3d Cir. 1979), petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980); *Johnson* v. *Alldredge*, 488 F.2d 820, 825 (3d Cir. 1973), cert. denied, 419 U.S. 882 (1974).[39]

In line with these authorities and the sound reasons of public policy on which they rest, petitioners Kissinger, Mitchell, and Haldeman should be absolutely immune in the circumstances of this case. Each of them acted, within the area of his respective responsibility, at the instance of

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[39] We also note that the doctrine of derivative immunity accords with common-law rules of agency and liability. See, *e.g.*, *Restatement (Second) of Agency* § 345 (1958); Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 Colum. L. Rev. 752, 770 (1967).

the President. It is clear, as respondents recognize (Br. in Opp. 20), that these petitioners were "acting in concert with the President." To deny them a derivative immunity would undermine the absolute protection of the President and would interfere with the unfettered discharge of presidential duties. For the same reasons that support an absolute immunity for the President, the Court should afford a corresponding derivative immunity to officials like Kissinger, Mitchell, and Haldeman, who act on behalf of the President pursuant to his specific directions.[40]

C. Petitioners Kissinger, Mitchell, And Haldeman Are Entitled To Absolute Immunity For Advising The President On Matters Within Their Respective Areas Of Responsibility

Petitioners Kissinger, Mitchell, and Haldeman have been sued in this case, at least in part, because of advice they rendered to the President—National Security Director Kissinger, for counseling the President on the security impact of leaks of sensitive information and for furnishing names of NSC personnel who had access to leaked material; Attorney General Mitchell, for advising the President on matters of law regarding national-security wiretaps; and Assistant to the President Haldeman, for providing information to the President in connection with his assigned review of the summaries of information resulting from the wiretap (see pages 2–5, *supra*). Insofar as the courts below have sought to premise damages liability on these actions, we submit that such a ruling was erroneous

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[40] We emphasize that this case does not involve a vague or general delegation of presidential authority to distant subordinates. Rather, petitioners Kissinger, Mitchell, and Haldeman were all high-ranking officials of the Executive Branch, and, as discussed above (see pages 2–5, *supra*), their roles in the overall program were defined with particularity by the President. While petitioners undoubtedly exercised some discretion in carrying out the President's directives, the nature and limits of their responsibilities were quite specifically designated. As the above cases make clear, the existence of discretion in performing delegated duties does not defeat a claim of derivative immunity.

and that petitioners Kissinger, Mitchell, and Haldeman are entitled to absolute immunity for their roles in advising the President.

The Constitution (Art. II, § 2) authorizes the President to obtain the opinion "of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[41] Indeed, even without this express provision, the President's authority to require the opinion of his closest aides and advisors "would result of itself from the office." *The Federalist* No. 74 (A. Hamilton) at 77 (1914 ed.). Thus, high-ranking executive officials act under a constitutional duty when they furnish their opinion to the President in response to his request.

As the Court has recognized, this exchange of information between presidential advisors and the President is protected by a privilege of confidentiality that has "constitutional underpinnings." *United States* v. *Nixon*, *supra*, 418 U.S. at 706. This "privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties * * * [and is] inextricably rooted in the separation of powers under the Constitution" (*id.* at 705, 708). Especially in the areas of national defense and foreign policy (*id.* at 706), such a privilege should be afforded the greatest weight.

In light of the constitutional authority of the President to demand the opinion of his advisors "upon any Subject relating to the Duties of their * * * Offices" and the constitutional privilege that attaches to their communications, subordinate executive officials are entitled to absolute immunity from civil damages actions arising out of advice they gave to the President. Allowing a President's closest

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[41] This provision of the Constitution was adopted with little debate. See, *e.g.*, II M. Farrand, *supra*, at 499, 541–543, 575, 599; II D. Watson, *supra*, at 923–934. Alexander Hamilton believed the provision to be "a mere redundancy in the plan" in light of the President's inherent authority (*The Federalist* No. 74 (A. Hamilton) at 77 (1914 ed.)), but, as Mr. Justice Story noted, "it is not without use, as it imposes a more strict responsibility, and recognises a public duty of high importance and value in critical times" (III J. Story, *supra*, § 1487, at 343).

advisors only a qualified immunity in this regard, with its attendant uncertainties and inhibiting effect, would seriously impair the President's constitutional authority to receive their views. Moreover, as discussed above (see pages 33–34, *supra*), a trial on the issues of reasonableness and good faith would severely breach the constitutional privilege acknowledged in *United States* v. *Nixon* and would deter the expression of "candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" (418 U.S. at 708).[42]

Accordingly, because the spectre of personal damages liability in these circumstances would unduly interfere with the obligations of presidential advisors under Art. II, § 2, to the detriment of "the conduct of the public business" (*Butz* v. *Economou*, *supra*, 438 U.S. at 507), petitioners Kissinger, Mitchell, and Haldeman should be

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[42] These concerns are well illustrated in this case, particularly with regard to petitioner Mitchell. Acting pursuant to his constitutional obligation to advise the President and his statutory duty to "give his advice and opinion on questions of law when required by the President" (28 U.S.C. 511), Attorney General Mitchell informed the President that, in his professional judgment, the initiation of the Halperin wiretap complied with the Constitution. Because the President could not be constrained to act only when the lawful course was clear, the Attorney General was required by his Office to make a legal determination on this complex and unsettled issue. In discharging his responsibility to assist the President in selecting the seemingly lawful action, the Attorney General would have been seriously inhibited if his legal judgment were formed under the threat of personal damages liability.

Indeed, because of the difficulty and novelty of the legal issues that confront the Attorney General, it can be expected that courts will not always agree with his considered legal conclusions. But the court of appeals essentially held that each time the judiciary disagrees with the Attorney General's advice, and suit is brought by an aggrieved party claiming malice or bad faith, the Attorney General must affirmatively establish his personal good faith in the performance of his Office. Such a burden would be regarded as intolerable if imposed on the district courts or courts of appeals each time one of their decisions was set aside on appeal. See *Stump* v. *Sparkman*, *supra*, 435 U.S. at 359–360; *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at 349. The burden can no more easily be borne by the Attorney General. Under the holding of this case, he must prove his good faith by testimony and evidence sub-

held absolutely immune in responding to the President's request for advice. The "special nature of their responsibilities" (*id.* at 511) as Cabinet officers and White House officials, coupled with the safeguards that minimize "the risk of an unconstitutional act" (*id.* at 514),[43] warrant "a full exemption from liability" (*id.* at 508) based on performance of their advisory and counseling functions.[44]

II. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW

In the event the Court concludes, contrary to our contention, that absolute immunity is unavailable in this case, we submit that petitioners are entitled to qualified immunity as a matter of law.

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mitted in lawsuits brought (as here) years after the relevant events have transpired. And the Attorney General may have to explain to a lay jury why he elected one rather than another interpretation of a complex question of law. The imposition of this burden on the Attorney General "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967).

[43] The giving of advice to the President cannot, without more, constitute a constitutional tort. Rather, that advice must first be accepted and acted upon by the President, who exercises his independent judgment based on information from a number of sources. Thus, the internal process of presidential decision-making serves to check the occurrence of unconstitutional actions resulting from the recommendations of a presidential advisor. Moreover, a presidential advisor bears the responsibility for the positions he presents to the President and the consequences of his advice. Especially where the President is making a decision in reliance upon an advisor's recommendation, this internal accountability strongly deters improper conduct by the subordinate.

[44] Apart from the immunities derived from relations with the President, high-ranking government officials in certain circumstances may also be entitled to an independent absolute immunity based on the "special functions" of their positions (*Butz* v. *Economou*, *supra*, 438 U.S. at 508). See, *e.g.*, *Mitchell* v. *Zweibon*, petitions for cert. pending, Nos. 79-881, 79-883 (filed Dec. 7, 1979); *Mitchell* v. *Forsyth*, petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980). While the Court's resolution of the presidential immunity issue will serve to clarify the application of *Butz*, we believe that, in light of the close nexus between presidential directives and the particular conduct at issue here, the Court need not reach any question of independent immunity in this case.

The doctrine of qualified immunity is premised on the belief that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz* v. *Economou*, 438 U.S. 478, 506–507 (1978). The Court's decisions have "emphasized * * * that, at least in the absence of some showing of malice, an official would not be held liable in damages * * * unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation" (*id.* at 498). See also *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). This "standard incorporates the idea that liability should not attach unless there was notice that a constitutional right was at risk." *Owen* v. *City of Independence, Missouri*, No. 78–1779 (Apr. 16, 1980), slip op. 12–13 (Powell, J., dissenting). And, of course, a government official is not "'charged with predicting the future course of constitutional law.'" *Wood* v. *Strickland*, *supra*, 420 U.S. at 322, quoting *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967); see also *Butz* v. *Economou*, *supra*, 438 U.S. at 507; *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 (1975). "Constitutional law is what the courts say it is, and * * * even the most prescient lawyer would hesitate to give a firm opinion on matters not plainly settled." *Owen* v. *City of Independence, Missouri*, *supra*, slip op. 13 (Powell, J., dissenting).

In *Procunier* v. *Navarette*, 434 U.S. 555 (1978), the Court applied these principles to hold that the public officials sued in that case were entitled to qualified immunity as a matter of law. Finding that the defendants "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared," the Court concluded "[a]s a matter of law * * * [that] there was no basis for rejecting the immunity defense on the ground that [the officials] knew or should have known that their alleged conduct violated a constitutional right" (*id.* at 565). Accordingly, "the Court held that since the constitutional right allegedly violated had not been authoritatively declared at the time the * * * officials acted, the officials

were entitled, as a matter of law, to prevail on their claim of qualified immunity." *Baker* v. *McCollan*, 443 U.S. 137, 139 (1979).

In the circumstances of the present case, it is clear that the alleged constitutional violations did not involve "settled, indisputable law" or "basic, unquestioned constitutional rights." *Wood* v. *Strickland*, *supra*, 420 U.S. at 321, 322. At the time the instant wiretap was authorized in April and May of 1969, the constitutional standards pertaining to national-security wiretaps were, at the least, unsettled. Indeed, it was less than two years earlier that the Court had first held the Fourth Amendment to be applicable to wiretaps at all. See *Berger* v. *New York*, 388 U.S. 41 (1967). None of the Court's ensuing decisions in *Katz* v. *United States*, 389 U.S. 347 (1967); *Alderman* v. *United States*, 394 U.S. 165 (1969); *Giordano* v. *United States*, 394 U.S. 310 (1969); and *Taglianetti* v. *United States*, 394 U.S. 316 (1969), dealt specifically with national-security wiretaps. To the contrary, the opinions in those cases recognized the separate and unresolved status of such wiretaps under the Fourth Amendment. See *Berger* v. *New York*, *supra*, 388 U.S. at 62;[45] *id.* at 113, 115–116 (White, J., dissenting);[46] *Katz* v. *United States*,

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[45] The Court's opinion in *Berger* cited to the Supplemental Memorandum for the United States in *Schipani* v. *United States*, No. 504 (O.T. 1966), which stated (page 4) that "[p]resent governmental practice * * * prohibits such electronic surveillance in all instances except those involving the collection of intelligence with respect to matters affecting national security. * * * [T]he specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked."

[46] As Attorney General Ramsey Clark explained in the congressional hearings cited by Mr. Justice White:

> Chairman Celler. The bill is definitely limited to cases involving national security?
>
> Mr. Clark. Directly involving the national security; that is right.
>
> Chairman Celler. And you do not ask that there be an interposition of a court order in the case of national security; it shall be on your say-so?

supra, 389 U.S. at 358 n.23; *id.* at 359–360 (Douglas, J., concurring); *id.* at 363–364 (White, J. concurring). As Mr. Justice Stewart observed in *Giordano* v. *United States*, *supra*, 394 U.S. at 314 (concurring opinion), "the Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information—necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage."

More than three years later, in *United States* v. *United States District Court*, 407 U.S. 297 (1972), the Court clearly acknowledged the distinct nature of national-security wiretaps in light of "[t]he covertness and complexity of potential unlawful conduct against the Government" (*id.* at 311–312) and "the necessarily broad and continuing nature of intelligence gathering" (*id.* at 320):

> Mr. Clark. That is correct.
>
> * * * * *
>
> Mr. Corman. * * *
>
> Getting back to your practice as presently established, who are the primary authorities under the statute who may authorize wiretapping or eavesdropping under this bill, under the national security section?
>
> Mr. Clark. The way the section reads, it provides that the constitutional power of the President shall not be limited by this bill in the national security area. The manner in which he exercises that constitutional power, insofar as the language § 2514 is concerned, is left to him.
>
> Mr. Corman. Then there is no limitation on his power to delegate that authority, as far as this statute is concerned; is that correct?
>
> Mr. Clark. As far as this statute is concerned, yes.
>
> Mr. Corman. Are there other statutory limitations on his authority to delegate power that would be effective here?
>
> Mr. Clark. No. Since 1940, as a matter of practice, the wiretaps have been placed by the approval of the Attorney General.

Hearings on H.R. 5386 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 90th Cong., 1st Sess. 288, 292 (1967).

> We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.
>
> * * * Different standards [for national-security wiretaps] may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.

Id. at 322-323. Even in holding that prior judicial approval was constitutionally required for "domestic" national-security wiretaps, the Court expressly declined to "attempt to detail the precise standards for domestic security warrants" (*id.* at 323) or to establish constitutional standards for "foreign" national-security wiretaps (*id.* at 308-309, 321-322). Although the District of Columbia Circuit later adverted to "some of the considerations which a judge should take into account in deciding whether it is reasonable to authorize installation of electronic surveillance equipment [in a foreign national-security case]," *Zweibon* v. *Mitchell*, 516 F.2d 594, 658 (D.C. Cir. 1975) (en banc; plurality opinion), cert. denied, 425 U.S. 944 (1976) (*Zweibon I*), it was not until 1978 (apart from the district court's decision in the present case) that a court first addressed the reasonableness standard specifically applicable to wiretaps in the national-security context. See *United States* v. *Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978), aff'd in pertinent part *sub nom. United States* v. *Truong Dinh Hung*, Nos. 78-5176, 78-5177 (4th Cir. July

17, 1980). See also *Chagnon* v. *Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980), slip op. 25-29.[47]

The uncertain state of the law was most evident with respect to the warrant requirement for national-security wiretaps. The government, upon consideration by a succession of Presidents and Attorneys General, had long been of the view that the President had the constitutional power to authorize national-security surveillance and that a judicial warrant was not required. See Pet. App. 80a-85a; see also pages 2-3 and note 3, *supra*; Brownell, *The Public Security and Wire Tapping*, 39 Cornell L.Q. 195, 197-200 (1954); Rogers, *The Case for Wire Tapping*, 63 Yale L.J. 792, 794-797 (1954).[48] In *Katz* v. *United States*, *supra*, the Court expressly reserved decision on this question (389 U.S. at 358 n.23). In his concurring opinion, Mr. Justice White endorsed the government's view, stating that "[w]e should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable" (389 U.S. at 364). However, Mr. Justice Douglas' concurring opinion rejected the government's argument (*id.* at 359-360). See also *Giordano* v. *United States*, *supra*, 394 U.S. at 314-315 (Stewart, J., concurring) (issue of warrant requirement for national-security wiretaps "remains open").[49]

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[47] We also note that the reasonableness standard specifically applicable to wiretaps in traditional criminal investigations was substantially clarified by this Court in *Scott* v. *United States*, 436 U.S. 128 (1978). The Court prefaced its discussion by noting that, "[b]ecause of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case." *Id.* at 139. See also *Chagnon* v. *Bell*, *supra*, slip op. 27; *Kilgore* v. *Mitchell*, No. 78-2702 (9th Cir. July 22, 1980), slip op. 7-8.

[48] Attorney General Mitchell also concluded that the existing procedures for national-security wiretaps were lawful (II J.A. 178) and, after discussions with the Solicitor General's Office and the Criminal Division of the Department of Justice, that these procedures were unaffected by the Court's decisions in *Katz* and *Alderman* (II J.A. 178-179, 180-181, 182-183).

[49] As Mr. Justice Stewart added (394 U.S. at 135), "[o]ne might suppose that all of this should be entirely clear to any careful reader of the

During the period of the Halperin wiretap, several courts sustained the government's position, holding that in national-security cases a warrant was not required under either the Fourth Amendment or Section 605 of the Federal Communications Act of 1934, 47 U.S.C. (1964 ed.) 605. See *United States* v. *Clay*, Cr. No. 67 H 94 (S.D. Tex. July 14, 1969), aff'd, 430 F.2d 165 (5th Cir. 1970), rev'd on other grounds, 403 U.S. 698 (1971); *United States* v. *O'Baugh*, 304 F. Supp. 767 (D.D.C. 1969); *United States* v. *Butenko*, 318 F. Supp. 66 (D.N.J. 1970), aff'd, 494 F.2d 593 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) (I J.A. 127–134); *United States* v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970) (I J.A. 135–137). The first contrary decisions were rendered during the final month of the Halperin surveillance in cases involving "domestic" security wiretaps. See *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Cal. 1971), and *United States* v. *Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971). The issue of warrantless national-security wiretaps continued to divide the lower courts, however,[50] and the question finally reached this Court—more than a year after the Halperin wiretap had been terminated—on review of the *Sinclair* decision. See *United States* v. *United States District Court*, 407 U.S. 297 (1972). Although eventually holding that a warrant was constitutionally required for domestic national-security wiretaps, the Court noted that it was addressing the issue "for the first time" (*id.* at 299) and that the question had been "left open by *Katz*" (*id.* at 309). The Court also emphasized that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without

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Court's opinion * * *. Perhaps so, * * * [b]ut 10 years of experience here have taught me that the most carefully written opinions are not always carefully read—even by those most directly concerned."

[50] See *United States* v. *Enten*, 388 F. Supp. 97 (D.D.C. 1971), aff'd on other grounds *sub nom*, *United States* v. *Lemonakis*, 485 F.2d 941, 961–963 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974); *United States* v. *Lyttle*, Cr. No. 58942–71 (D.C. Super. Ct. Jan. 12, 1972) (I J.A. 138–141).

guidance from the Congress or a definitive decision of this Court" (*id.* at 299), and that the government's contentions in support of warrantless surveillance "merit the most careful consideration" (*id.* at 319).[51]

Moreover, while resolving the warrant issue for "domestic" national-security wiretaps, the Court reserved decision on the constitutional requirements applicable in cases of "foreign" national-security surveillance. *United States* v. *United States District Court*, *supra*, 407 U.S. at 308–309, 321–322. Several courts thereafter held that a warrant was not required for any such foreign security wiretap. See *United States* v. *Butenko*, 494 F.2d 593 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); see also *United States* v. *Buck*, 548 F.2d 871, 875–876 (9th Cir.), cert. denied, 434 U.S. 890 (1977). However, in 1975, the District of Columbia Circuit rejected this position in its *Zweibon I* decision, holding that a warrant must be obtained for foreign security wiretaps of domestic groups or persons who are neither agents of nor collaborators with a foreign power—the category of wiretap involved in the present case.[52]

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[51] The Court also rejected the government's contention that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*) recognized and affirmed the President's inherent authority to conduct warrantless national-security wiretaps (407 U.S. at 301–308). Petitioner Mitchell had relied in part on the government's interpretation of Title III in concluding that such warrantless wiretaps were constitutional (II J.A. 178).

[52] Prior to *Zweibon I*, the District of Columbia Circuit itself had recognized that the law in this area was unsettled. In *United States* v. *Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974), the court observed that the issue of non-domestic national-security wiretaps had been "expressly reserved" in *United States* v. *United States District Court*, *supra*, and that this Court had been "at pains to differentiate this activity from" foreign-intelligence surveillance (485 F.2d at 962 & n.31). In addition, the court of appeals, referring to "foreign intelligence gathering * * * as delicate and sensitive" and affecting "fragile international relationships," acknowledged "the significant differences that exist between foreign intelligence opera-

In view of the development of the law in this area, it can scarcely be doubted that, at a minimum, the constitutional standards alleged to have been violated by the Halperin wiretap were not "clearly established" (see page 50, *supra*) during the period the wiretap was in place. And, at least in the absence of a controlling judicial resolution, "each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States* v. *Nixon*, 418 U.S. 683, 703 (1974). Since the legal principles relied on by respondents involved neither "settled, indisputable law" nor "basic, unquestioned constitutional rights" (see page 51, *supra*), petitioners were entitled to qualified immunity as a matter of law. See also *Chagnon* v. *Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980).

Nevertheless, the court of appeals rejected petitioners' qualified-immunity claim on two grounds. First, without disputing that there was no clearly established warrant requirement for national-security wiretaps before 1972,[53] the court of appeals stated that the district court had correctly ruled that the application of the Fourth Amendment's reasonableness requirement to national-security surveillances was "established law" at the time of petitioners' actions in this case (Pet. App. 40a-41a). The district court had concluded that the 21-month duration of the wiretap on respondents' telephone was unreasonable and thus in violation of the Fourth Amendment,[54] a fact that (according to the court) petitioners Mitchell and

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tions and information, on the one hand, and that of the domestic variety, on the other" (*id.* at 963). See also *Chagnon* v. *Bell*, *supra*, slip op. 17-20.

[53] The court of appeals remanded to the district court for consideration of petitioners' qualified-immunity defense with respect to their belief that a warrant was not required for a national-security wiretap (see pages 9-10, *supra*). Because petitioners are entitled to immunity as a matter of law, we believe that the Court may appropriately consider the issue at this stage.

[54] The court of appeals applied the same reasoning in the companion cases of *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), petition for cert. pending, Nos. 79-881, 79-883 (filed Dec. 7, 1979), and *Smith*

Haldeman at least should have known (*id.* at 40a).[55] But neither the district court nor the court of appeals cited any preexisting decisions or statutes to support the conclusion that the length of the challenged wiretap violated "established law." This is understandable because, as discussed above (see pages 51–58, *supra*), there was literally *no* "established law" at the time concerning Fourth Amendment requirements in the context of national-security surveillance.[56] Indeed, in its 1972 decision in *United States* v. *United States District Court*, *supra*, the Court noted the distinctive nature of national-security wiretaps and indicated that the reasonableness standard of the Fourth Amendment for such surveillance is necessarily different from that applicable to ordinary criminal investigations (see pages 53–54, *supra*). And even in applying the warrant requirement to domestic national-security wiretaps, the Court declined to specify the governing constitutional standard (see page 54, *supra*). It is thus apparent that there was no "established law" to guide petitioners in the conduct of the surveillance challenged in this case.[57]

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v. *Nixon*, 606 F.2d 1183 (D.C. Cir. 1979), petition for cert. pending, No. 79–882 (filed Dec. 7, 1979), although the wiretaps in those cases were far shorter in duration (six months and three months, respectively).

[55] The district court did not attribute such knowledge to petitioners Nixon and Kissinger, who, after May 1970, were not direct recipients of the wiretap summaries (see page 5, *supra*). The court of appeals rejected their claims of qualified immunity nonetheless, holding that they must "establish their subjective good faith [at trial] as an affirmative defense" (Pet. App. 40a). These petitioners, it bears repeating, had relied on the legal opinion of the Attorney General in authorizing and executing the wiretap.

[56] The courts below also failed to distinguish between the general applicability of the Fourth Amendment reasonableness standard to national-security wiretaps and the content of the reasonableness standard in that context. See, *e.g.*, *United States* v. *Ramsey*, 431 U.S. 606, 618 n.13 (1977).

[57] Prior to 1972, national-security wiretaps averaged between 78 and 209 days in length. See *United States* v. *United States District Court*, *supra*, 407 U.S. at 325 (Douglas, J., concurring). See also *United States* v. *Truong Dinh Hung*, *supra*, slip op. 5 (national-security wiretap continued for 268 days between May 1977 and January 1978).

The court of appeals also suggested that petitioners are not entitled to qualified immunity because the district court had concluded that the wiretap was continued in "bad faith" (Pet. App. 41a). The court of appeals relied in this regard on *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975), which held that the qualified immunity of a school official would be lost if "he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury * * *." See also, *e.g.*, *Gomez* v. *Toledo*, No. 79-5601 (May 27, 1980), slip op. 6. The court apparently equated the possibility that the wiretap was continued in "bad faith" with a "malicious intention to cause a deprivation of constitutional rights or other injury."[58]

There are two problems with this aspect of the court of appeals' reasoning. First, the district court did *not* hold that petitioners acted in bad faith. The court ruled instead that, although the continuation of the wiretap violated the reasonableness requirement of the Fourth Amendment, this conduct was not reckless or done with "malicious disregard of [respondents'] rights" (Pet. App. 56a).[59] It rejected petitioners' claim of qualified immunity on the ground that, "[r]egardless of intention, they violated [respondents'] basic, constitutional right * * * [and] are charged with knowledge of established law" (*id.* at 74a). Accordingly, the district court's decision in this regard does not rest on any finding of subjective malice. Because there was no clearly established law to guide petitioners' conduct, and because they did not act with malicious in-

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[58] It seems obvious, however, that petitioners could not have maliciously intended to deprive respondents of a constitutional right that at the time was not known to exist.

[59] This finding was made in connection with the district court's determination that punitive damages against petitioners would be unwarranted. Although the standards of malicious intent for punitive damages and for qualified immunity are not necessarily identical, we believe it is most unlikely that the district court would have denied punitive damages here if it had found, as the court of appeals suggested, that petitioners acted in bad faith and with a malicious intent in not terminating the wiretap in this case.

tent, petitioners were entitled to qualified immunity as a matter of law even under the standards of *Wood* v. *Strickland*. See *Baker* v. *McCollan*, *supra*, 443 U.S. at 139; *Procunier* v. *Navarette*, *supra*, 434 U.S. at 562; cf. *United States* v. *Peltier*, 422 U.S. 531, 541–542 (1975).[60]

Moreover, the precise limits of the doctrine of qualified immunity are not the same for all officials, but vary "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer* v. *Rhodes*, 416 U.S. 232, 247 (1974). It is undisputed that the scope of discretion and breadth of responsibility entrusted to the President, and to the advisors who assist and act for him, differ markedly from those of federal officials generally. The same reasons that support the conclusion that these officials are absolutely immune for their official acts (see pages 25–50, *supra*) also indicate that, if their immunity is only qualified, they should not be required to disprove allegations of "malice" in personal damages actions.

The court of appeals recognized that charges of malice can be easily made and that the necessity of a trial on such claims could seriously disrupt the President's conduct of Office (Pet. App. 47a). Moreover, the conventional doctrine of qualified immunity is entirely inadequate to safeguard the execution of presidential duties (see pages 32–37 and pages 37–38 note 34, *supra*). Because of the special functions performed by the President and the need to avoid undue interference with the responsibilities of his Office in a scheme of separated powers, the President and officials acting for him should be entitled to qualified immunity as a matter of law where their conduct did not ig-

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[60] Insofar as the Court concludes, contrary to this discussion, that the record is inadequate to determine the issue of petitioners' intent, it should remand to the district court for further proceedings. In so doing, however, we believe it would be appropriate, in view of the public policies supporting the doctrine of official immunity, for the Court to set forth the legal standards to be applied on remand. See *Butz* v. *Economou*, *supra*, 438 U.S. at 507–508.

nore or defy clearly established constitutional requirements. This application of the qualified-immunity doctrine to the President and his closest advisors would impose a judicial check on intentional misconduct without subjecting them to the possibility of a lengthy and disruptive hearing on allegations of malice that would rarely be sustainable (see Pet. App. 45a).

III. THIS COURT'S DECISION IN *UNITED STATES* v. *UNITED STATES DISTRICT COURT*, AND LOWER COURT RULINGS AMPLIFYING THAT DECISION, SHOULD NOT BE APPLIED RETROACTIVELY TO CREATE PERSONAL DAMAGES LIABILITY FOR FEDERAL OFFICERS

As discussed above (see pages 51–58, *supra*), the constitutional standards applicable to national-security wiretaps were, at the least, not clearly established during the period the Halperin wiretap was in effect. Nevertheless, the court of appeals in this case (Pet. App. 29a–32a), relying on its decision in the companion case of *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), petitions for cert. pending, Nos. 79–881, 79–883 (filed Dec. 7, 1979) (*Zweibon III*), ruled that petitioners are subject to personal damages liability for their involvement in this surveillance. In so holding, the court has concluded that petitioners are to be held accountable under constitutional norms that simply did not exist at the time. As the Ninth Circuit held in *Weinberg* v. *Mitchell*, 588 F.2d 275 (1978), this retroactive application of judicial decisions to impose substantive standards of conduct, in the context of a suit for monetary relief against the individual petitioners, is wholly unwarranted.

In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106–107 (1971), this Court set out the principles governing retroactivity in civil cases:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by

> overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker*, [381 U.S.] at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma*, [395 U.S.] at 706.

Each of these factors argues in this case against retroactive application of the requirements developed by the courts long after the termination of the Halperin wiretap.

a. Judicial decisions in this area, rendered after the Halperin wiretap was concluded, presented issues of first impression and were not clearly foreshadowed by prior law. As previously demonstrated, there was at the time of this surveillance no guiding determination of the standards applicable to national-security wiretaps. In 1969, several lower courts held that the President was not required to obtain a judicial warrant for such wiretaps. In early 1971—approximately one month before the end of the Halperin wiretap—the first decisions requiring a warrant for domestic national-security surveillance were issued by district courts. In June 1972—16 months after the Halperin wiretap had been discontinued—this Court held in *United States* v. *United States District Court* that a warrant was necessary under the Fourth Amendment for domestic national-security wiretaps. In the course of its opinion, however, the Court noted that there had never been "a definitive decision of this Court" on the question (407 U.S. at 299), that the "issue * * * [was before the Court] for the first time" (*ibid.*), that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees" (*ibid.*), and

that it did "not reject * * * lightly" the government's arguments in support of warrantless national-security wiretaps (*id.* at 319).

The Court also noted the special characteristics that distinguished national-security wiretaps from those involved in criminal investigations, but it left open both the precise standards for "domestic" national-security wiretaps and the constitutional requirements for "foreign" national-security surveillance. Following *United States District Court*, several courts held that a warrant was not required in connection with any such foreign security wiretaps. See page 57, *supra*. However, in its 1975 decision in *Zweibon I*, the District of Columbia Circuit reached a different result, ruling that a warrant was constitutionally required where, as in the present case, a foreign security wiretap is placed on a domestic organization or individual who is not acting in concert with a foreign power. Finally, although *United States District Court* and *Zweibon I* had briefly referred to the general Fourth Amendment doctrine of reasonableness for national-security wiretaps, it was not until 1978 that the first court addressed the reasonableness standard specifically applicable to such surveillance.

Against this background, it is clear that *United States District Court* and related decisions involved novel issues of law whose resolution was not clearly foreshadowed. See *Weinberg* v. *Mitchell*, *supra*, 588 F.2d at 277-278. For the reasons discussed above (see pages 51-58, *supra*), the fact that "the Supreme Court in the late 1960s certainly demonstrated great concern over unrestrained warrantless wiretapping" (*Zweibon III*, *supra*, 606 F.2d at 1178) falls far short of suggesting that the courts would apply Fourth Amendment doctrines developed in the criminal law enforcement area to national-security wiretaps or that, if the doctrines were held applicable, they would be interpreted in the same way.[61] As the Ninth Circuit correctly con-

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[61] Even in the law-enforcement context, as the court of appeals itself conceded, "the Fourth Amendment's * * * reasonableness standard may vary in different situations" (Pet. App. 19a; footnote omitted).

cluded, *United States District Court* "was quite a step beyond the warrant requirements in *Katz* and other cases." *Weinberg* v. *Mitchell, supra*, 588 F.2d at 277.

The court of appeals also erred in finding that petitioners' "reliance on prior Executive practice does not bear directly on our determination, since Executive actions cannot represent an authoritative source of constitutional standards" (*Zweibon III, supra*, 606 F.2d at 1179 n.36). To the contrary, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States* v. *Nixon, supra*, 418 U.S. at 703. See also *Lemon* v. *Kurtzman*, 411 U.S. 192, 207 (1973) (plurality opinion) ("governments must act [even in the absence of an authoritative judicial decision] if they are to fulfill their high responsibilities"). Similarly, the court of appeals' determination that petitioners were not entitled to rely on lower-court decisions upholding warrantless national-security wiretaps (*Zweibon III, supra*, 606 F.2d at 1179 n.36) is entirely unfounded.

> [U]nless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm. Cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973).

United States v. *Peltier*, 422 U.S. 531, 542 (1975) (footnote omitted). See also *Procunier* v. *Navarette, supra*, 434 U.S. at 565; *Lemon* v. *Kurtzman, supra*, 411 U.S. at 206; *Chevron Oil Co.* v. *Huson, supra*, 404 U.S. at 107;

See, *e.g.*, *Marshall* v. *Barlow's, Inc.* 436 U.S. 307, 320–321 (1978); *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554–555 (1976); *Terry* v. *Ohio*, 392 U.S. 1, 20–21 (1968).

Kilgore v. *Mitchell*, No. 78-2702 (9th Cir. July 22, 1980), slip op. 5.[62]

b. Retroactivity also will not further the purpose of these intervening constitutional standards. See, *e.g.*, *Lemon* v. *Kurtzman*, *supra*, 411 U.S. at 201-203. As the Court explained in *United States* v. *United States District Court*, *supra*, 407 U.S. at 315, 317, the rules governing national-security wiretaps are designed to protect "the needs of citizens for privacy and free expression" and to avoid "potential invasions of privacy and protected speech." Through these requirements, courts have sought to provide "reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur" (*id.* at 321). Thus, these decisions "look[] to a *future* free from such surveillance." *Weinberg* v. *Mitchell*, *supra*, 588 F.2d at 278 (emphasis added). While it may be true, as the court of appeals observed (*Zweibon III*, *supra*, 606 F.2d at 1179, 1180 & n.41), that compensation for past wrongs is the underlying rationale for the cause of action recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),[63] that does not suggest in any way that the preventive purpose of *United States District Court* and subsequent decisions such as *Zweibon I* would be promoted by retroactive application in the present case. See *United States* v. *Peltier*, *supra*, 422 U.S. at 535, 538.[64]

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[62] Indeed, in holding that petitioners were subject to liability for the failure to obtain a warrant, the court of appeals itself relied on a lower-court decision—*Zweibon I*—that has never been approved by this Court.

[63] See also *Carlson* v. *Green*, No. 78-1261 (Apr. 22, 1980), slip op. 6; *Butz* v. *Economou*, 438 U.S. 478, 505 (1978). We note that *Bivens* was decided after the Halperin wiretap had been terminated.

[64] In our view, a different retroactivity question would be presented if, as occurred in this case (see note 14, *supra*), a plaintiff requested relief other than monetary damages. For example, if a plaintiff sought equitable relief ordering the destruction of records obtained from a warrantless wiretap, it is at least arguable that retroactivity would promote the purpose of the judicially-recognized warrant requirement

c. Perhaps most important, it would be seriously inequitable to subject petitioners, by means of a retroactive application of the law, to personal damages liability for failing to conform to constitutional guidelines that did not then exist. In cases involving civil as well as criminal liability, "the notion that persons have a right to fair warning of that conduct that will give rise to * * * [liability] is fundamental to our concept of constitutional liberty." *Marks* v. *United States*, 430 U.S. 188, 191–192 (1977). See also *Lemon* v. *Kurtzman*, *supra*, 411 U.S. at 199; *Bouie* v. *City of Columbia*, 378 U.S. 347, 352–353 (1964). For this reason, retroactivity should especially be avoided where, as here, it would "reach back to disturb or to attach legal consequence to patterns of conduct premised [on existing legal standards]" and would upset the "reliance interests founded upon the old [rule of law]" (411 U.S. at 198). See also *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 720–721 (1974).[65] As early as *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (Marshall, C.J.), this Court "implored the courts to 'struggle hard against a construction which will, by a retrospective operation, affect the rights of parties.' " *Bradley* v. *School Board of the City of Richmond*, *supra*, 416 U.S. at 717, quoting 5 U.S. (1 Cranch) at 110. In light of these principles, the retroactive creation of a constitutional tort action and the imposition on petitioners of personal liability for conduct that was not wrongful at the time, as the court of appeals has done, "would be as inequitable as *ex post facto* criminal liability * * * [and]

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by eliminating any continuing effect on plaintiff's privacy. But where damages are at issue, we do not believe that retroactivity would foster the values to be served by the constitutional standard.

[65] The court of appeals acknowledged that a holding of retroactivity could not be premised here on the notion that "the standards for tort liability probably have little impact on actual conduct." As the court noted, "the standards of the Fourth Amendment were considered [by petitioners], though perhaps incorrectly gauged, in establishing the Government's policy on national security wiretaps" (*Zweibon III*, *supra*, 606 F.2d at 1180).

would be nothing short of punitive." *Weinberg* v. *Mitchell, supra*, 588 F.2d at 278. See also *Kilgore* v. *Mitchell*, No. 78-2702 (9th Cir. July 22, 1980), slip op. 9; *Morales* v. *Hamilton*, 391 F. Supp. 85, 88 (D. Ariz. 1975).

The court of appeals sought to avoid this consideration by noting that "the qualified immunity available to [petitioners for reasonable actions taken in good faith] ensures that no such inequitable result can occur." *Zweibon III, supra*, 606 F.2d at 1181; see also *id.* at 1179 n.38. The court therefore viewed the doctrine of nonretroactivity as "redundant" in light of petitioners' affirmative defense of qualified immunity (*id.* at 1181). But this reasoning overlooks the substantial and fundamental differences between the two concepts. To begin with, nonretroactivity rests on the view that "we cannot regard as blameworthy those parties who conform their conduct to the prevailing * * * constitutional norm. Cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973)." *United States* v. *Peltier, supra*, 422 U.S. at 542. It is a far different matter for the law to exonerate high-ranking federal officials as not blameworthy than to hold that they committed a constitutional tort but are excused from personal liability because their wrongful acts were taken in good faith.

In addition, the doctrine of retroactivity better serves to avoid the unfairness and hardship of burdensome proceedings and unjustified monetary damages. For example, the issue of retroactivity presents a legal question that would be decided by the judge rather than by lay jurors and would be resolved at a pretrial stage without the need for extensive discovery or a trial. In contrast, as the court of appeals explained (Pet. App. 38a-40a), the issue of qualified immunity would generally have to be submitted to the jury at trial, thus subjecting the defendant official to the full onus of litigation and the risk of an erroneous or unprincipled jury decision. Similarly, disposition of these and like cases on the ground of nonretroactivity would promote the development of a coherent and systematic body of law, including appellate review, in a way that is

not possible with respect to jury verdicts on the question of qualified immunity. For these reasons, the court of appeals erred in rejecting the principle of nonretroactivity and relying exclusively on the affirmative defense of qualified immunity to avert the inequity and injustice of personal damages actions against federal officials based on conduct that was not wrongful at the time it occurred.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-880

HENRY KISSINGER, *et al.*,
Petitioners,

v.

MORTON HALPERIN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OCTOBER TERM, 1979

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HENRY KISSINGER, *et al.*,
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

A. Introduction.

On May 13, 1969, agents of the Federal Bureau of Investigation, acting at the direction of petitioners Nixon, Mitchell, and Kissinger, installed a warrantless wiretap on the Halperin family's home telephone. Although the purported purpose of the surveillance was to determine whether Morton Halperin was the source of unauthorized "leaks" of classified information, no such evidence was

gathered, and it is undisputed that the wiretap revealed nothing which cast doubt on Halperin's loyalty or discretion. (Pet. App. 59a; II J.A. 248, 253.) Nonetheless, petitioners continued the surveillance for twenty-one months and made no effort to limit it to conversations that might have been related to leaks. Consequently numerous conversations concerning personal and political matters were overheard, summarized, and disseminated. Among the items reported to the White House were conversations relating to Senator Muskie's presidential campaign and the views of Republican Senators on legislation relating to the war in Indochina. (I J.A. 254-255.)

The Halperin surveillance was the longest in a program conducted by petitioners that included seventeen wiretaps on thirteen government officials and four journalists.[1] In its summary of evidence supporting impeachment of petitioner Nixon, the House Judiciary Committee found that these wiretaps served "no lawful purpose of his office; they had no national security objective, although he falsely used a national security pretext to attempt to justify them. Information obtained from this surveillance was used by his subordinates, with his authorization or permission, for his political advantage; and the FBI records of electronic surveillance were concealed at his direction."[2] A Senate investigation found that the entire program "did not reveal the source of any leaks of classified data. . . but it did generate a wealth of information about the personal

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[1]Minority Memorandum on Facts and Law, Hearings Before the House Judiciary Committee Pursuant to H. Res. 803, Authorizing and Directing the Committee to Investigate Whether Sufficient Grounds Exist for the House of Representatives to Impeach Richard M. Nixon, 93 Cong. 2d Sess. 62, 71 (July 22, 1974).

[2]Report of the House Committee on the Judiciary: Impeachment of Richard M. Nixon, H. R. Rep. No. 93-1305, 93 Cong. 2d Sess. 146 (1974).

lives of the targets — their social contacts, their vacation plans, their employment satisfactions and dissatisfactions, their marital problems, their drinking habits, and even their sex lives [as well as] [v]ast amounts of political information . . . ."[3]

Petitioners contend that despite the broad and intrusive nature of the Halperin wiretap, they are not liable in damages to respondents for their decisions to initiate and continue the surveillance because they are absolutely immune and because they violated no law that was clearly established at the time of the wiretap. Because petitioners' brief states the facts in a highly selective fashion, it is necessary to provide the Court with a more complete history of the relevant events against which to measure petitioners' legal arguments.

B. The Wiretap.

The wiretapping program had its genesis in late April or early May 1969, when Nixon, Mitchell, and Kissinger, in consultation with FBI Director Hoover, decided that such a program was necessary to identify the source of leaks to the press. (Pet. Br. 1-3.) Nixon directed Kissinger to provide to the FBI names of individuals who had access to leaked information and who were suspected of leaking. (II J.A. 19, 61-62, 160.) Nixon further directed that Mitchell approve the wiretaps before the FBI initiated them. (II J.A. 61-63.) The reports from the surveillance were originally sent to Nixon, Kissinger, and occasionally Mit-

[3]Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities, S. Rep. 94-755, 94th Cong., 2d Sess., Book II, 200 (1976). The committee also found that "[a]mong those who were incidentally overheard on one of the wiretaps was a currently sitting Associate Justice of the Supreme Court of the United States who made plans to review a manuscript by one of the targets." (*Id.*)

chell, and in May 1970, Nixon assigned Haldeman to monitor the reports.

Petitioners assert that "Dr. Halperin was selected for surveillance on the grounds that Director Hoover had identified Halperin at the April 25 meeting as having unfavorable information in his security file, that Dr. Kissinger had included Halperin's name on the list of key NSC personnel with access to leaked information, and Hoover had advised Kissinger on May 9 that a preliminary investigation showed Halperin to be a principal suspect regarding the leaks." (Pet. Br. 4 n.6.) However, the record indicates a different sequence of events leading to Halperin's selection.

Although petitioners had earlier decided to embark on a wiretap program, the event which triggered the first taps was a May 9, 1969 story by William Beecher in the *New York Times* describing the operational details of secret American B-52 bombing raids on Cambodia. (Pet. Br. 3.) At that time Halperin was working for Kissinger as Chief of the National Security Council Planning Group, having been recruited for this position by Kissinger. (II J.A. 195-196.) Prior to joining the NSC staff, Halperin had been a Deputy Assistant Secretary of Defense during the Johnson Administration.

Kissinger met with Halperin on May 9 and told him that he was suspected of being the source of the Beecher article. Halperin assured Kissinger that he was not and pointed out that he did not even have access to the information in the article. (I J.A. 214.)[4] Kissinger stated that he ac-

[4]Halperin also lacked access to much of the information which appeared in the news stories prior to May 9 that had alarmed Nixon and his advisors and had been the purported reason for initiating the wiretap program. (I J.A. 267, 319-320.)

cepted Halperin's assurances but said that a number of high level figures in the Nixon Administration were suspicious of Halperin and considered him disloyal. (I J.A. 214-215.) Accordingly, Kissinger told Halperin that he would cut off Halperin's access to sensitive information for a time so that if any more information leaked, Halperin could not be blamed. (I J.A. 215.)

On May 9, Kissinger also called Hoover and requested "a major effort" to find the source of the Beecher story. (I J.A. 170.) Later in the day, according to Hoover's memorandum, Hoover told Kissinger that "our investigation led to nothing very definite except the possibility that [Beecher's] story was primarily on informed speculation as there had been made available publicly a lot of source material from which he could draw his conclusions." (I J.A. 171.) Although Hoover concluded that the information might have come from the NSC staff, he also said that there was "a strong possibility" that the leak came from offices at the Department of Defense where scores of employees had access to the information. (I J.A. 173.) Hoover also told Kissinger that there was only "speculation" tying Halperin to the Cambodian bombing story and other leaks. (*Id.*) Hoover's comments about Halperin did not mention any adverse security information or any propensity to leak. (I J.A. 174.)[5]

On the day of the Beecher story, Kissinger directed his military assistant, Col. Alexander Haig, to draw up a list of those who had access to information about the bomb-

[5]Except for this brief flurry of activity on May 9, 1969, before the taps began (I J.A. 170-175), there is no indication that the FBI ever conducted any further investigation of Halperin in addition to the wiretap. There were no interviews, no physical surveillances, no lie detector tests, no attempts to contact journalists or FBI informants and no reports of any conclusion as to likely leakers. (Pet. App. 72a.)

ing campaign. (Haig Dep. 143.) Since Halperin did not have access to the published information, Haig did not include Halperin on the list which he prepared for Kissinger. (Haig Dep. 142-143.) Kissinger, however, instructed Haig to give to the FBI the names of four individuals who were not on Haig's list, including Halperin. (II J.A. 212-214.) Significantly, Kissinger listed none of the members of his staff who had access to the bombing information. (*Id.*)

While there was no evidence suggesting that Halperin was a likely leaker, there is much evidence suggesting that he was selected for other purposes. Kissinger later stated that the three members of his staff whose names he gave to Haig were individuals whom others in the Administration had urged him not to hire. (I J.A. 330-331; II J.A. 198-199.) Halperin in particular had been the subject of strong letters to Nixon and Mitchell from Senator Barry Goldwater urging that Halperin and other hold-overs from the Johnson Administration not be retained. (I J.A. 167-169.) Furthermore, Haldeman and the Chairman of the Joint Chiefs of Staff had raised objections with Kissinger over hiring Halperin. (II J.A. 196-198.) It thus appears that Kissinger selected Halperin as a wiretap target not because he suspected him of leaking, but rather to bolster Kissinger's standing in the White House and to diffuse the criticism of his staff appointments.

On May 10, 1969, Haig, acting on Kissinger's instruction, visited William Sullivan – the Assistant Director of the FBI in charge of the Intelligence Division – and requested electronic surveillance of the four individuals identified by Kissinger. (Haig Dep. 135-36; I J.A. 175-176.) Haig also requested that no records of the surveillance be maintained and that if possible the Department of Justice not be informed. Haig further proposed that he would come to Sullivan's office to review the

results of the surveillance rather than receiving reports at his own office. (I J.A. 175-176.)

Sullivan forwarded Kissinger's request to Hoover, who submitted a memorandum seeking the Attorney General's approval for the four surveillances. (I J.A. 177.) Although Department of Justice regulations required that such applications include "a general description of the activities subject is engaged in and the type of information which it is anticipated will be obtained through the electronic coverage [and] the period of time for which approval is requested" (I J.A. 163), this memorandum provided only the following supporting information:

> Halperin, aged 30, was detailed from the Department of Defense to the National Security Council as a senior staff member on January 21, 1969. He was the subject of an applicant-type investigation by the Bureau. While admittedly he has had contact with Soviet nationals the investigation did not disclose at that time any pertinent derogatory information.

(I. J.A. 177.) Notwithstanding the lack of any pertinent derogatory information about Halperin or any other stated reason to wiretap him, Mitchell signed the memorandum on May 12, 1969, thereby approving the surveillance.[6]

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[6]Petitioners have never identified any information in Halperin's security file indicating a propensity to leak. The "unfavorable" information to which they refer (Pet. Br. 4 n.5) concerns two minor instances where Halperin erred in filling out security forms during his employment at the Department of Defense. (A detailed analysis of these incidents is set forth at I J.A. 268-277.) When Halperin transferred from the Defense Department to the NSC at the outset of the Nixon Administration, Kissinger reviewed these incidents and deter-

From May 13, 1969 to February 10, 1971 the wiretap was continuously in place on the Halperin home telephone.[7] During this period Morton Halperin had little or no access to sensitive information because Kissinger never resumed Halperin's access after cutting it off on the same day he selected Halperin for surveillance. (I J.A. 214-216.) Halperin left the NSC staff four months later on September 19, 1969, although Kissinger attempted to persuade him to remain, even offering to resume Halperin's full access to sensitive information. (II J.A. 229.) At Kissinger's request, Halperin did agree to assume a consultant status with the NSC, which he maintained until the following May, but he had no access to any classified NSC information in that capacity. (I J.A. 216.)

Despite Halperin's limited and eventual total lack of access to sensitive information and the absence of any evidence that he was engaged in leaking, petitioners never reconsidered the propriety of the Halperin wiretap, even though Department of Justice regulations required that an authorization for a national security wiretap be renewed every 90 days. (II J.A. 134-135.) Indeed, petitioners rejected suggestions from experienced officials of the FBI that the tap be terminated. Two days after the tap was in-

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mined that Halperin was suitable for employment and the accompanying high level clearances. (I J.A. 327-330.) Indeed, the FBI security report on Halperin to the NSC did not even mention these two incidents. (J.A. 298-299.) The inconsequential nature of Halperin's ommissions is demonstrated by the fact that the Defense Department, the Central Intelligence Agency, and the Atomic Energy Commission subsequently approved him for numerous highly restricted top secret clearances. These clearances remained in effect until Halperin resigned from the National Security Council staff in September 1969. (I J.A. 287-293.)

[7]The logs show that there were interceptions beginning on May 9, 1969 when the FBI appears to have unilaterally initiated the surveillance. (Jones Dep. 6; Belter Dep. 61-62.)

stalled, Sullivan notified Hoover that no information related to leaks had been uncovered. (I J.A. 178.) On June 20, 1969, Haig, acting for Kissinger, accepted Sullivan's recommendation to discontinue the wiretaps of some suspected leakers, but not the one on Halperin even though "nothing of late relevant to leaks" had been discovered. (I J.A. 183.) On July 8, 1969, Sullivan reported to Hoover that "nothing has come to light of significance from the standpoint of the leak in question" and that he believed that Halperin knew his phone was tapped. Accordingly, Sullivan suggested to Haig that "some of this coverage be removed." (I J.A. 184.) In July 1970, the FBI agent in charge of the surveillance wrote to Sullivan that he had not "noticed much info of value in recent months" and recommended that the wiretap be discontinued. (I J.A. 206.) Finally on February 10, 1971, the wiretap was removed (I J.A. 211), although there is no indication that this was due to any action undertaken by petitioners.[8]

The FBI employees who monitored the phone listened to all conversations, tape recorded ones they thought to be significant, and prepared written logs of some conversations. (Belter Dep. 37-38, 92.) The log entries, which were forwarded to Sullivan's office, ranged from verbatim texts of conversations to simple notations of the times of calls and the identity of the conversants. (Belter Dep. 37-40, 63; Jones Dep. 25.) Of the many thousands of calls which were overheard, 638 calls were logged. (I J.A. 227.)

[8]According to Acting Director of the FBI, William D. Ruckelshaus, it was Hoover's practice to discontinue warrantless wiretaps shortly before congressional appearances so that he could report a minimum number of taps in operation if questioned. The Halperin wiretap was terminated just before Hoover's appearance before the House Appropriations Committee. (Report of the House Committee on the Judiciary, *supra* at 148-149.)

Twenty-seven percent (173) of these calls were between Mr. and Mrs. Halperin; forty-three percent (272) of the calls were between Mrs. Halperin – who had never had access to, or was alleged to be leaking, classified information – and third parties; only twenty-nine percent (186) of the logged calls were between Mr. Halperin and third parties. (*Id.*) The three Halperin children were each specifically identified once in the logs, and 13 other entries in the logs note calls involving unidentified children. (*Id.*) The remaining logged calls involved guests who used the Halperin home telephone.

At the outset of the surveillance, Haig, and on at least one occasion Kissinger, went to Sullivan's office to read the logs. (I J.A. 179-180; Sullivan Dep. 80.) Beginning at the end of May 1969, the FBI summarized the logged information in letters which were sent to both Nixon and Kissinger over Hoover's signature. (I J.A. 264; Sullivan Dep. 42-43; Haig Dep. 41-43.) Copies of at least three of these letters were also sent to Mitchell. (I J.A. 249, 264; II J.A. 162.) Nixon, Mitchell, Kissinger, and Haldeman were at least generally familiar with the contents of the letters because they either read them or were briefed on them, and all of them discussed the contents with at least a few other individuals. All of them were aware that no information was being obtained relating to leaks and that much personal and political information was being gathered and disseminated. (II J.A. 98-100, 162, 238-239, 300-301.)

For example, in December 1969 petitioners learned from the wiretap that Morton Halperin was assisting former Secretary of Defense Clark Clifford in writing an article for *Life Magazine* criticizing the Nixon Administration's Vietnam policy. (I J.A. 191-192.) This information was used by White House staff members "to springload

ourselves to a position from which we can effectively counter whatever tack Clifford takes." (I J.A. 193.) In May 1970, the FBI prepared a memorandum for Hoover summarizing the information which had been sent to Nixon and Kissinger since the announcement on April 30, 1970 of the invasion of Cambodia. (I J.A. 201-202.) The "highlights" from the Halperin tap included information that Halperin planned to resign his consultant's position with the NSC to protest the invasion, that Halperin believed the President would attack North Vietnam and Laos, that Halperin agreed to work with Senator Fulbright in opposing the war, and that Halperin and others were forming an organization to oppose the war. (*Id.*)

On May 12, 1970, Nixon and Hoover met to discuss the wiretap program. Nixon directed that thereafter the summary letters should be directed to Haldeman, who would screen them and pass pertinent information to Nixon and Kissinger. (I J.A. 203-205; II J.A. 293-296.) From this point until the termination of the tap in February 1971, the FBI sent Haldeman sixteen summary letters which contained substantial amounts of information pertaining to the political activities of Halperin and others. These letters reported on Halperin's contacts with Senators, including their private views on pending legislation to end the Vietnam war, the efforts of various citizens' groups to lobby against the war, development of a foreign policy position by Common Cause, and the activities of the Muskie presidential campaign in which Halperin became involved as a foreign policy advisor. A sampling of these summary letters is set out in Volume I of the Appendix at pages 252-256.

Following the termination of the wiretap, vigorous efforts were made to conceal it from authorities lawfully entitled to be informed of it. At Nixon's direction all records were

removed from the FBI and stored first with Assistant Attorney General Robert Mardian and then in John Ehrlichman's White House safe. (I J.A. 260-261, 264.) Following the indictment of Daniel Ellsberg in June 1971 for his participation in the publication of the Pentagon Papers, his counsel were repeatedly told in response to discovery requests that he had not been overheard on any FBI wiretap. In fact, Ellsberg had been overheard at least fifteen times on the Halperin wiretap and had been mentioned in one of the summary letters sent to Kissinger and Nixon. (Report of the House Committee on the Judiciary, *supra* at 154; letter dated September 3, 1969; I J.A. 259, 264.)

In February 1973, *Time Magazine* informed the White House that it had learned of the wiretapping program, but the White House denied the story. (Report of the House Committee on the Judiciary, *supra* at 154-155.) In March 1973, at the confirmation hearings of L. Patrick Gray to be Director of the FBI, Gray was asked whether the FBI had conducted the wiretaps described in the *Time* story, and he answered that the FBI did not have records reflecting the existence of such taps. (*Id.*) Nixon, who knew that the FBI files were incomplete because of his orders to hide the records in the White House, did not intervene to order Gray or any other official to advise the Committee of the facts. (II J.A. 111-115.)

The existence of the wiretap program first became known to respondents on May 10, 1973. The previous day, William D. Ruckelshaus, Acting Director of the FBI, filed a memorandum with the trial judge in the Ellsberg case, advising him that he had just learned that Ellsberg had been overheard on the Halperin wiretap while a guest of the Halperins. (I J.A. 262, Ruckelshaus Dep. 6.) The following day, the judge ordered the release of this

memorandum and shortly thereafter Ruckelshaus recovered the Halperin wiretap records from Ehrlichman's safe and returned them to the FBI. (I J.A. 262-263, 264.)

C. District Court Proceedings.

Respondents filed suit against petitioners Kissinger, Mitchell, Haldeman, and others in June 1973 alleging that the wiretap violated their rights under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Although then President Nixon had publicly announced on May 23, 1973 that he had authorized the entire wiretap program (I J.A. 212-213), he was not named as a defendant when the suit was filed. In July 1974, the House Judiciary Committee voted to impeach Nixon, and one of the articles of impeachment included the wiretap program.[9] On August 9, 1974, Nixon resigned from office, and on September 8, 1974, President Ford pardoned him for all offenses he may have committed against the United States while in office. Moreover, by that time several depositions in this case had demonstrated that Nixon was personally involved in the Halperin wiretap. *See Halperin* v. *Kissinger,* 401 F. Supp. 272 (D.D.C. 1975). It was only after all these events that respondents amended their complaint on September 30, 1974 to include the former President as a defendant.

After the parties had completed discovery, they cross moved for partial summary judgment on the issue of liability. The District Court accepted petitioners' contention that the wiretap was installed to investigate leaks, despite factual disputes on this issue. (Pet. App. 68a.) The Court also found that "defendants' determination that Title III was inapplicable to the Halperin wiretap was

[9]Debate on Articles of Impeachment, House Committee on the Judiciary, 93d Cong. 2d Sess. 369-447 (1974).

reasonable during the period of the surveillance" and that there was "no genuine issue of fact in the record controverting this good faith belief on defendants' part." (Pet. App. 66a.) This ruling was based on the Court's view that the scope of the national security proviso to Title III, 18 U.S.C. § 2511(3), was unsettled at the time of the Halperin surveillance, prior to the rulings in *United States* v. *United States District Court,* 407 U.S. 297 (1972) (holding warrants required for internal security surveillances) and *Zweibon* v. *Mitchell,* 516 F.2d 594 (D.C. Cir.) (*en banc*), *cert. denied,* 425 U.S. 944 (1976) (holding warrants required and Title III applicable in all cases where target of surveillance is not the agent or collaborator of a foreign power). (Pet. App. 63a-66a.)

Turning to respondents' Fourth Amendment claims, the District Court assumed that the warrant requirement was inapplicable (Pet. App. 67a, 70a) and examined whether the surveillance satisfied the reasonableness requirement of the Amendment. Without passing on the propriety of selecting Halperin, the Court characterized the wiretap as "a dragnet which lacked temporal and spatial limitation" and which represented "the antithesis of the 'particular, precise, and discriminate' procedures required by the Supreme Court in numerous Fourth Amendment cases." (Pet. App. 69a.) Accordingly, the Court ruled that the "surveillance constituted an invasion of plaintiffs' privacy and freedom of expression" and was "per se unreasonable under the Fourth Amendment and unjustified by any possible exception thereto." (Pet. App. 69a-70a.)

In determining the liability and responsibility of the individual petitioners, the District Court carefully distinguished between their different roles in the wiretap:

—Nixon was found liable for having authorized the overall program, for overseeing it, and for failing to take any affirmative action to terminate the Halperin

surveillance or reduce its scope when he was aware that no information relating to leaks was being obtained and that much non-pertinent information was being gathered. (Pet. App. 70a-73a.)

—Mitchell was found liable for failing to carry out his review and renewal obligations under Justice Department regulations, both when the tap was initiated and throughout its twenty-one month life. *(Id.)*

—Haldeman was found liable for failing to recommend termination of the tap when he knew that the summary letters contained no information relating to leaks but much non-pertinent information, and for having disseminated the information for purposes unrelated to the tap's original justification. (Pet. App. 72a-73a.)

The District Court ruled that these petitioners cannot claim "absolute immunity for their excessive actions." (Pet. App. 73a.) The Court also ruled that petitioners Nixon, Mitchell, and Haldeman were not entitled to any good faith defense for the overly broad surveillance. (Pet. App. 73a.) This ruling was based on two different findings. First, as an objective matter, "their activities relating to the wiretap continuance [were] unreasonable and in violation of established Fourth Amendment rights." (Pet. App. 73a.) Second, the Court found that under all the circumstances — "a twenty-one month wiretap continuance without fruits or evidence of wrong-doing, a failure to renew or evaluate the material obtained, a lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents" — petitioners had failed to establish a subjective good faith defense. (Pet. App. 74a.)

The District Court granted summary judgment in Kissinger's favor because of his "inactive role and [his]

lack of oversight authority." (Pet. App. 75a.) The Court found that Kissinger had "provided Mr. Halperin's name to the FBI since he appeared to meet the criteria established for those suspected of leaking classified information." *(Id.)* Although Kissinger received reports from the surveillance, the Court found that he had regarded Nixon, Mitchell, and Hoover "as responsible for determining when to terminate the wiretap." *(Id.)*

In a subsequent opinion the District Court refused to award compensatory damages because respondents had not alleged any physical or economic injury. (Pet. App. 55a-56a.) The Court also ruled that punitive damages were inappropriate, even though petitioners had failed to establish a good faith defense, because "their conduct cannot fairly be characterized as wanton, reckless or malicious disregard of plaintiffs' rights. . . ." (Pet. App. 56a.) Accordingly, the Court ruled that respondents were entitled to only nominal damages of one dollar each. *(Id.)* At that time, the Court also permanently enjoined defendants – including the Director of the FBI who had been sued in his official capacity for purposes of equitable relief – from making any use or disclosure of respondents' intercepted communications and ordered them to place exonerating information in Halperin's security file, including Kissinger's sworn statement that he knew of no wiretap information impugning either Halperin's loyalty or his discretion. (Pet. App. 59a.)

D. The Court of Appeals Decision.

On cross appeals, the Court of Appeals ruled for respondents in all respects. Relying on this Court's intervening decision in *Butz* v. *Economou,* 438 U.S. 478 (1978), the Court of Appeals rejected the claim of Mitchell, Haldeman, and Kissinger that they are entitled to

absolute immunity. (Pet. App. 36a-37a.) It also reversed the summary judgment in favor of Kissinger, finding material facts to be in dispute regarding his responsibility for the wiretap. (Pet. App. 49a-50a.)[10]

With respect to Nixon's claim that he is entitled to greater protection because of his former office, the Court held that a former President is not entitled to absolute immunity from damage liability arising from an unconstitutional wiretap and rejected his contention that presidential absolute immunity is constitutionally mandated. (Pet. App. 42a-45a.) Not only did the Court find that the Constitution is silent with respect to any such immunity (Pet. App. 42a), but it also concluded that article 1, section 3, clause 7, which provides that an impeached President may be criminally tried, implies that "incumbency does not relieve the President of the routine obligations that confine all citizens." (Pet. App. 43a.) The Court also rejected the argument that the doctrine of separation of powers requires absolute immunity since such a holding would abdicate the judiciary's role in protecting constitutional rights. (Pet. App. 44a-45a.)

Turning to the "prudential grounds" which petitioners so vigorously press in this Court, the Court of Appeals weighed the advantages and disadvantages of presidential liability for constitutional violations and rejected the assertion that "the repercussions of finding liability would be drastically adverse." (Pet. App. 42a.) Noting that "the denial of absolute immunity is intended to affect Executive behavior that threatens to violate constitutional rights," the Court concluded that "if we are serious about providing a remedy for constitutional violations, there can be no rational basis, as the *Economou* Court emphasized, for

[10]Kissinger does not challenge that ruling in this Court. (Pet. Br. 10 n.11.)

holding inferior officials liable for constitutional violations while immunizing those higher up." (Pet. App. 45a-46a.) Relying on the principle that "[n]o man in this country is so high that he is above the law," the Court applied the logic of *Economou* to Presidents. (Pet. App. 49a.)

At the same time, the Court reasoned that "suits that may successfully be pursued against a President will be quite rare." (Pet. App. 45a.) This is so because the doctrine of qualified immunity, as articulated by this Court in *Scheuer* v. *Rhodes,* 416 U.S. 232, 247-249 (1974), provides a "sliding scale" of protection according to the responsibilities of the official, which necessarily gives the maximum protection to a President. (Pet. App. 46a-47a.) Consequently, he will be inhibited in the discharge of his duties only from the clearest violations of the constitutional rights of citizens, and in most cases "plaintiffs would have substantial difficulty in defeating a President's claim of immunity." (Pet. App. 47a.)[11]

With respect to respondents' statutory claim, the Court held that Title III would apply to "any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities" and remanded for a determination

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[11] Judge Gesell filed a concurring opinion urging that "a more exacting standard be placed on the showing a plaintiff must make before proceeding to trial in the face of a properly presented qualified immunity claim." (Pet. App. 53a.) In his view, "the plaintiff must establish after the completion of discovery and before trial commences, not merely the existence of a genuine dispute as to some material fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith." (Pet. App. 52a-53a.) Judge Gesell did not, however, suggest that respondents in this case failed to meet this higher standard.

of the purpose of the wiretap. (Pet. App. 28a.)[12] In so ruling, the Court indicated that it had substantial doubts about whether the wiretap was initiated and conducted for the alleged purpose of identifying leakers. In particular, it noted its doubt about the period after May 1970 when Halperin had resigned as an NSC consultant, had lacked access to sensitive information for the preceeding year, and continuous surveillance had revealed no evidence that he was a leaker. (Pet. App. 26a.) It also noted that after Halperin left the NSC staff in September 1969, the national security rationale "would seem almost equally attenuated." (Pet. App. 27a.) Finally, the Court specifically directed the District Court to examine respondents' contention that Halperin was originally selected for surveillance to bolster the political credibility of Kissinger's staff appointments. (Pet. App. 27a-28a.)

With respect to the constitutional claims regarding the institution of the wiretap, the Court of Appeals rejected the District Court's view and held that a warrant was required at the initiation of the surveillance (Pet. App. 29a-31a) and remanded for a determination of whether petitioners can avoid liability based on a good faith defense due to the uncertainty of the law in 1969. (Pet. App. 31a, 41a.) In addition, the Court affirmed the District Court's rulings that the continuation of the surveillance was constitutionally unreasonable (Pet. App. 29a) and that petitioners are not entitled to qualified immunity for this aspect of respondents' claims. (Pet. 40a-41a.) However, the Court remanded for a determination of when the wiretap became unreasonable. (Pet. App. 29a.) The Court stressed that in "a complex case like this one, the District Court must undertake a particularized inquiry into the immunity available for each alleged type or

[12]Petitioners have not appealed from this decision or asserted absolute immunity from Title III liability. (Pet. Br. 10 n.16.)

period of constitutional or statutory violation in order to safeguard both the individual rights asserted by the Halperins and the freedom of Executive officials to act." (Pet. App. 41a.)

With regard to the appropriate level of damages for Fourth Amendment violations, the Court directed that further proceedings be held, ruling that "even if a constitutional violation inflicts only intangible injury, compensation is still appropriate" (Pet. App. 33a.), a ruling that petitioners have not challenged in this Court. (Pet. Br. 10 n.16.) However, in light of its reinstatement of the statutory claims, the Court noted that respondents could not recover simultaneously under both Title III and the Constitution. (Pet. App. 31a.)

E. **Proceedings In This Court.**

After petitioners filed their petition for a writ of certiorari, respondents moved in the District Court to disqualify government counsel from continuing joint representation of petitioners on two grounds. First, they pointed out that because of petitioners' differing roles, responsibilities, and defenses, conflicts of interest existed among them which should prevent joint representation and that such joint representation also made it impossible for respondents to attempt to settle with one or more of the four petitioners so long as they all were represented by the same attorney. Second, respondents argued that the Department of Justice could not adequately represent these individuals because the institutional interests of the goverment were not congruent with those of the petitioners. In both instances, the petition for certiorari had brought these conflicts into sharp focus. On the same day respondents filed their motion in the District Court, they also filed a motion in this Court for leave to defer filing

their brief in opposition until after the District Court ruled on the disqualification motion. On March 17, 1980, this Court denied respondents' motion to defer. On March 28, 1980, the District Court denied the disqualification motion without prejudice to renewal at a later date. The petition for certiorari was granted on May 19, 1980.

SUMMARY OF THE ARGUMENT

I.

In *Butz* v. *Economou,* 438 U.S. 478 (1978), the Court held that federal executive officials have a qualified rather than absolute immunity from damages liability in suits alleging violations of constitutional rights. This decision was based on the conviction that no man in this country is above the law and that the higher the official the greater the risk of abuse of power and therefore the greater the need for damage remedies to deter unconstitutional conduct and to compensate its victims. Since petitioner Nixon was directly responsible for a massive invasion of respondents' Fourth Amendment rights, the rule established in *Economou* applies to him. Petitioners urge, however, that the President is entitled to absolute immunity because the Framers of the Constitution intended to immunize the President from civil suit and because the special functions of the presidency require such immunity. Both contentions are without merit.

The Framers clearly intended that the President was to be subject to the law rather that above it. In providing that he could be impeached for crimes against the government, they also intended that injured citizens would continue to have recourse against even an impeached President under the common law.

Petitioners' policy argument is based in large part on substantial overstatement of the implications of the decisions below. This case involves a continuous twenty-one month violation of respondents' Fourth Amendment rights through a surreptitious wiretap, and therefore affirmance will not involve the courts in routine oversight of the vast range of the President's discretionary responsibilities. There may well be other torts for which absolute immunity is appropriate and other presidential functions toward which the courts should show deference. This case, however, only requires the courts to exercise their well-established role in protecting the constitutional rights of citizens against executive action which exceeds the limitations imposed by the Constitution. Indeed, petitioners concede that in some circumstances the President is subject to suits for injunctive relief, and it is difficult to understand why they resist judicial review of his conduct in the context of damage actions.

Petitioners also contend that damage actions against a President are unnecessary because he is sufficiently constrained by the system of checks and balances, including the possibility of impeachment. It is obvious that those constraints had no prophylactic effect on the conduct which led to this case, and damage actions are therefore a useful addition to the arsenal of checks on official misconduct. Moreover, the institutional mechanisms on which petitioners would exclusively rely do not offer any compensation for citizens whose rights are violated, and this Court has held damage remedies should be available in such situations. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

Petitioners further contend that qualified immunity is insufficient to protect the President from intolerable distractions and burdens imposed by pending litigation. This argument overlooks the fact that qualified immunity provides a sliding scale of protection which varies accor-

ding to an official's position. Accordingly, it necessarily affords the greatest degree of protection to a President because of the scope of his discretion, the responsibilities of his office, and the exigent circumstances in which he often must act. Thus, a President will become personally involved in litigation only when it is clearly shown that he directly participated in violations of constitutional rights, and suits alleging anything less will meet an early dismissal. If a sitting President should be sufficiently implicated in a damage suit that his active participation is required — and none has — district courts have broad discretion to minimize the burden on him and could even stay proceedings until he left office.

II.

Petitioners Kissinger, Mitchell, and Haldeman recognize that it is settled under *Economou* v. *Butz* that they are entitled to only qualified immunity, but they argue that if petitioner Nixon is afforded absolute immunity, they should receive the same measure of protection on a derivative theory. The premise of this argument is the assumption that these three petitioners were mere agents executing petitioner Nixon's orders. To the contrary, Kissinger, Mitchell, and Haldeman all had distinct roles in the Halperin wiretap involving broad discretion, and it is for these individual roles that they are sued, rather than for any advice they may have furnished to Nixon. Kissinger selected wiretap targets, decided when to terminate the surveillances, and was responsible for choosing Halperin. Mitchell, who supervised the wiretaps, was required to approve specific taps and periodically review them under Department of Justice regulations, and his failure to do either resulted in the overly broad and excessively lengthy surveillance of the Halperin family. Haldeman monitored the information gleaned from the wiretap and used it for improper political purposes.

Furthermore, there is no legal basis for petitioners' derivative immunity argument. This Court has repeatedly held that Congressional employees are not entitled to derivative immunity under the Speech or Debate Clause when they engage in unlawful conduct even though a member of Congress may be immune for authorizing the conduct. *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). Similarly, even if petitioner Nixon is absolutely immune for authorizing and overseeing the wiretap program, petitioners Kissinger, Mitchell, and Haldeman should not have a derivative absolute immunity for their actions in conducting the Halperin wiretap.

III.

Petitioners contend that they are entitled to qualified immunity as a matter of law because the requirements of the Fourth Amendment with respect to national security wiretaps were unsettled at the time of the Halperin wiretap. For the same reason, they also contend that the decisions below unfairly imposed retroactive liability.

The principal flaw in these arguments is that petitioners have not established on their motion for summary judgment that the Halperin wiretap was conducted for bona fide national security purposes and there is substantial evidence in the record that it was conducted for improper political purposes. In 1967, this Court held that the Fourth Amendment applies to electronic surveillance of telephones calls, although the Court reserved the question of whether the warrant requirement applies in national security cases. *Katz* v. *United States*, 389 U.S. 347. Therefore if the 1969-1971 Halperin wiretap was not conducted for national security purposes, it plainly violated the Fourth Amendment. Petitioners cannot escape liability

by labeling a political intelligence operation a "national security" operation, and the undisputed factual predicate which is necessary to establish their right to summary judgment on their qualified immunity and retroactivity defenses is missing.

A second flaw in petitioners' argument is that since *Katz* only reserved the question of whether warrants are required in national security wiretaps, it was settled in 1969 that the reasonableness requirement of the Fourth Amendment applied with full force to the Halperin wiretap. The elements of Fourth Amendment reasonableness in the electronic surveillance area had been spelled out prior to 1969 in cases such as *Berger* v. *New York*, 388 U.S. 41 (1967). Since the Halperin wiretap was conducted for twenty-one months without producing any evidence of leaking and without any attempt to minimize the interception, logging, and dissemination of non-pertinent conversations, it violated law that was clearly established before the tap was installed. Therefore, the legal predicate for petitioners' qualified immunity and retroactivity arguments is also missing.

Petitioners are not entitled to summary judgment on their qualified immunity defense for the additional reason that they have failed to establish the absence of a factual dispute on whether they initiated and conducted the Halperin wiretap in good faith without an improper motive, a deliberate intention to injure respondents, or a reckless disregard for respondents' interests. It is well established that the affirmative defense of qualified immunity requires both a showing that the defendant did not violate any clearly established right of which he knew or should have known and that he acted in subjective good faith. *E.g.*, *Wood* v. *Strickland*, 420 U.S. 308 (1975). In this case, the evidence of petitioners' political rather than national security purposes in initiating and conducting the Halperin wiretap and their indifference to the prolonged

violation of respondents' privacy is sufficiently strong to preclude a finding of good faith on petitioners' motion for summary judgment.

ARGUMENT

I. PETITIONER NIXON IS NOT ENTITLED TO ABSOLUTE IMMUNITY FROM CIVIL LIABILITY FOR DELIBERATE VIOLATIONS OF RESPONDENTS' FOURTH AMENDMENT RIGHTS.

The question presented here is whether a former President enjoys absolute immunity from civil liability for actions he took in office which violated Fourth Amendment rights. The case does not involve violations of other rights, and affirmance of the decision below certainly will not authorize "routine oversight" by the judiciary of all presidential actions. (Pet. Br. 17-18, 33, 34.) In *Butz* v. *Economou,* 438 U.S. 478 (1978), this Court ruled that the rights of citizens and the interests of efficient government will be best accommodated if federal executive officers are afforded qualified rather than absolute immunity in cases alleging knowing violations of constitutional rights. *Economou* therefore provides the analytic framework for answering the question presented here, and the logic of *Economou* requires that its holding be applied to the chief officer of the executive branch. Petitioners, however, seek to relitigate the Court's determinations in *Economou,* since neither history nor public policy justify a different immunity for the President than is available to all other executive officials.[13]

[13]The immunity that petitioner Nixon seeks is not in fact absolute because he has not sought review of his liability for damages under Title III, 18 U.S.C. § 2520. (Pet. Br. 10 n.16.) Therefore, even if he prevails on the question presented of absolute immunity from

A. The Analytic Framework.

In ruling on the degree of immunity which is appropriate for any given government official, this Court has considered a number of factors which should guide its decision with respect to the immunity of Presidents. First, it has determined that while officials may be absolutely immune from liability for common law torts which they inflict in the course of the duties, violations of constitutional rights are treated differently. Second, it has determined that damage actions are an important means of securing constitutional rights because they compensate the victim for his loss and deter official misconduct. Third, the Court has generally afforded officials a qualified rather than absolute immunity for constitutional torts, although the scope of this qualified immunity expands in proportion to the broader duties and discretion of high-ranking officials. Fourth, where the Court has granted absolute immunity, it has done so only with respect to participants in judicial or quasi-judicial proceedings where misconduct is deterred by the open adversary system and abuses are correctable through appellate procedures. Finally, the Court has based its immunity decisions on a careful analysis of the official's function which gave rise to the injury and has refused to extend absolute immunity categorically on the basis of titles or positions. Each of these factors is examined below in greater detail.

In *Economou,* the Court concluded that absolute immunity for federal officers who knowingly and deliberately violate constitutional rights "is contrary to the course of decision in this Court from the very early days of the

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respondents' constitutional claims, he still will face trial on the statutory claims, which depend on the sharply disputed factual issue of whether at all times over the twenty-one months of the wiretap, its "primary purpose [was to protect] national security information against foreign intelligence activities." (Pet. App. 28a.)

Republic." 438 U.S. at 487. While federal officials enjoy absolute immunity for common law torts arising from discretionary actions taken within the outer perimeter of their responsibility,[14] the Court concluded that "it cannot be doubted that these officials. . . are subject to the restraints imposed by the Federal Constitution." 438 U.S. at 495. Actions which knowingly and deliberately violate a citizen's Fourth Amendment rights are not within any official's line of duty because the Amendment is a restraint and a limitation on governmental action. *Id.; Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 392 (1971). As James Madison stated when he offered the Bill of Rights in the First Congress, "If [these rights] are incorporated into the constitution . . . they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive." I Annals of Congress 439 (1789).

The Court also stressed in *Economou* that "[i]n situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees" and extension of absolute immunity to all federal officials would "seriously erode" these guarantees. 438 U.S. at 505-506. As the Court has recognized, damage actions play an important role in protecting constitutional rights because they compensate victims of unlawful official conduct and deter officials from such conduct. *Carlson* v. *Green,* 100 S. Ct. 1468, 1473 (1980); *Butz* v. *Economou, supra,* 438 U.S. at 505, *Robertson* v. *Wegmann,* 436 U.S. 584, 590-91 (1978).

The twin policies of compensation and deterrence do not diminish when high ranking officials are responsible for unconstitutional conduct. First, the victim's need for compensation plainly is not reduced whatever the rank of

[14] *See, e.g., Barr* v. *Matteo,* 360 U.S. 564 (1959); *Spalding* v. *Vilas,* 161 U.S. 483 (1896); *Kendall* v. *Stokes,* 44 U.S. (3 How.) 87 (1845).

the responsible official. Second, in a statement that is strikingly applicable to the White House wiretapping program, the Court has stressed that the higher the official, the greater the opportunity for abuse of power, and therefore the greater the need to deter constitutional violations through damage suits:

> The broad authority possessed by [federal executive] officials enables them to direct their subordinates to undertake a wide range of projects — including some which may infringe such important personal interests as liberty, property, and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale.

Butz v. *Economou, supra,* 438 U.S. 505-506.

This Court has also recognized "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Economou* v. *Butz, supra,* 438 U.S. at 506. However, in order to balance protection of officials with protection of citizens' constitutional rights, the Court has concluded that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.* at 506-507. Thus, in the area of constitutional torts, the Court has

held that federal officials are entitled to the same qualified immunity defense available to state officials. *Id.* at 507.

This qualified immunity is a flexible one which takes into account the official's position, the scope of his responsibility and discretion, and the exigencies of the situation giving rise to the claim against him. "[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer* v. *Rhodes,* 416 U.S. 232, 247-248 (1974).

Although the Court in *Economou* held that as a general rule federal executive officials exercising discretion are entitled only to qualified immunity in damage suits arising from unconstitutional actions, it acknowledged that there are "exceptional situations where. . . absolute immunity is essential for the conduct of public business." 438 U.S. at 507. Thus, it has long been recognized that the "special functions" of judges and of prosecutors in their advocacy roles "require a full exemption from liability." 438 U.S. at 508. In examining the rationale for absolute immunity for judges and prosecutors, the Court noted that "[t]he cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process," and that "the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." 438 U.S. at 512. Judges are insulated from political pressure, they are governed by precedent, they make deci-

sions on the basis of public adversary presentations, and above all, their errors can be corrected on appeal. *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); *Stump* v. *Sparkman*, 435 U.S. 349, 369, 369-370 (1978) (Powell, J., dissenting); *Apton* v. *Wilson*, 506 F.2d 83, 93-94 (D.C. Cir. 1974). Prosecutors are similarly hemmed in by the public adversary system and the availability of appeal. Because there are similar safeguards in agency adjudications, the Court was willing to apply absolute immunity to administrative law judges and those who initiate and prosecute agency actions. *Butz* v. *Economou, supra*, 438 U.S. at 512-517.

To be sure, the Court has extended absolute immunity to judges, prosecutors, and their agency counterparts in part because of their vulnerability to suit by dissatisfied litigants and the inhibition that the threat of suit would pose to the exercise of their duties. 438 U.S. at 509-511, 513, 515. However, such vulnerability alone, without the concomitant safeguards of the judicial process, is not enough to justify absolute immunity. If it were, police officers would be absolutely immune because they are the "segment of the executive branch of a state government that is most. . . frequently exposed to situations which can give rise to claims" of constitutional violations. *Scheuer* v. *Rhodes, supra*, 416 U.S. at 244. Nevertheless, "[t]he common law has never granted police officers an absolute and unqualified immunity. . . ." *Pierson* v. *Ray, supra*, 386 U.S. at 555. Similarly, if vulnerability to suit alone were a sufficient justification for absolute immunity, state governors, national guard commanders, teachers, and prison officials would be absolutely immune, but the Court has held that they are not. *Scheuer* v. *Rhodes, supra*, 416 U.S. 232; *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Procunier* v. *Navarette*, 434 U.S. 555 (1978). *See Imbler* v. *Pachtman*, 424 U.S. 409, 436 (1976) (White, J., concurring). These decisions demonstrate that the absolute im-

munity of judges and prosecutors is justified not only by their vulnerability to suit, but also by the fact that the judicial process provides safeguards to protect citizens who may be harmed by their actions.

In determining whether a particular official is entitled to absolute immunity, the Court also has distinguished between the official's different functions. "[T]he immunity conferred might not be the same for all officials for all purposes." *Doe* v. *McMillan*, 412 U.S. 306, 319 (1973). Thus, the same official may enjoy absolute immunity for some functions but only qualified immunity for others. In *Imbler* v. *Pachtman, supra*, 424 U.S. 409, the Court held that a prosecutor is absolutely immune for acts performed within the scope of his duties in conducting a criminal prosecution. At the same time the Court was careful to note that it was not deciding whether absolute immunity is required for "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." 424 U.S. at 430-431.[15] The importance of such a functional analysis of an official's varying duties is emphasized by the fact that three members of the Court in *Imbler* believed that a prosecutor should have absolute immunity from suits alleging the knowing use of perjured testimony, but have only a qualified immunity for suits alleging unconstitu-

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[15]In so ruling the Court noted that several Courts of Appeals have ruled that prosecutors do not enjoy absolute immunity for their functions outside the judicial process. 424 U.S. at 430 n.31. Following *Imbler*, the Courts of Appeals have continued to apply this distinction. *Lee* v. *Willins*, 617 F.2d 320 (2d Cir. 1980); *Hampton* v. *Hanrahan* 600 F.2d 600, 631 (7th Cir. 1979), *rev'd in part on other grounds*, 100 S. Ct. 1987 (1980); *Jacobson* v. *Rose*, 592 F.2d 515, 524 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979); *Slavin* v. *Curry*, 574 F.2d 1256, 1264 (5th Cir. 1978); *Briggs* v. *Goodwin* 569 F.2d 10, 20 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978), and cases cited therein; *Helstoski* v. *Goldstein*, 552 F.2d 564 (3d Cir. 1977); *Kipps* v. *Ewell*, 538 F.2d 564 (4th Cir. 1976).

tional suppression of evidence. 424 U.S. 432-447 (White, Brennan, Marshall, J.J., concurring). In *Butz* v. *Economou* the Court also implicitly recognized that the same official may enjoy absolute immunity for some of his functions but qualified immunity for others. This distinction is evident from the fact that agency officials who enjoy absolute immunity when they initiate administrative proceedings also perform other functions in the agency to which absolute immunity does not attach.

The Court has demonstrated the importance of functional analysis not only in cases concerning the immunity of executive branch officials, but also in cases concerning judicial and legislative immunity. For example, the Court recently held that a state supreme court is absolutely immune with respect to its legislative function in promulgating rules for attorneys' conduct, but not with respect to its independent enforcement function in initiating disciplinary proceedings against members of the bar. *Supreme Court of Virginia* v. *Consumers Union of the United States*, 100 S. Ct. 1967 (1980). *Cf. Zarcone* v. *Perry*, 572 F.2d 52 (2d Cir. 1978).

The Court has also employed functional analysis in construing the scope of the immunity constitutionally conferred on members of Congress by the Speech or Debate Clause. For example, in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), the Court held that a Senator is not immune from libel suits arising from the distribution of defamatory information in press releases and newsletters. Although a "speech by Proxmire in the Senate would be wholly immune. . . neither the newsletters nor the press release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process." *Id.* at 130. Even though the Senator urged that such materials were means of communicating with his colleagues and constituents, the Court ruled that this "informing func-

tion" was not protected by the Speech and Debate Clause because it is "not a part of the legislative function or the deliberations that make up the legislative process." 443 U.S. at 133. *See Gravel* v. *United States*, 408 U.S. 606, 621, 624-626 (1972); *United States* v. *Brewster*, 408 U.S. 501, 512-513 (1972); *United States* v. *Johnson*, 383 U.S. 169, 172 (1966).

Against this backdrop, we turn to the question of whether petitioner Nixon has carried "the burden of showing that public policy requires" absolute immunity from civil liability for his role in surreptitiously authorizing and overseeing an unconstitutional wiretap. *Butz* v. *Economou, supra,* 438 U.S. at 506. An examination of the historical materials and the policy considerations proffered by petitioner demonstrates that they are insufficient, in connection with the actual functions involved here, to alter the balance struck by the Court in *Economou*, which serves simultaneously to protect constitutional rights by permitting damage actions and to protect officials with qualified rather than absolute immunity.

B. There Is No Evidence That The Framers Of The Constitution Intended The President To Be Absolutely Immune From Civil Liability For Constitutional Violations.

Petitioners assert that the Framers of the Constitution intended that the President would be absolutely immune from civil liability and that impeachment, the election process, public opinion, and the system of checks and balances would be the exclusive remedies for presidential misconduct. (Pet. Br. 20-24.) Unable to cite any positive

evidence for their position in the constitutional debates, petitioners assert that "[n]othing in the entire course of these deliberations suggests in any way that the President was also to be liable to suit for money damages arising out of the conduct of his Office." (Pet. App. 23-24.) It can be said just as accurately that nothing in the Framers' deliberations suggests that the President was to be immune from suits for money damages arising out of the conduct of his office.[16]

What is clear from the debates and contemporaneous writings of the Framers is that they intended the President to be subject to the law rather than above it, in contrast to the King of England. Thus, James Wilson told the Pennsylvania ratifying convention that "not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." II J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (1836). *See The*

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[16]Petitioners find some support for their position in Mr. Justice Story's Commentaries and in a debate in the First Senate. (Pet. Br. 20.) With due respect to Mr. Justice Story, who was not a member of either the Constitutional Convention or any of the state ratifying conventions, his views in this regard are representative of what this Court has recently termed "an archaic view of the doctrine of separation of powers." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). The extreme view expressed by Vice President Adams and Senator Ellsworth that no process can issue against the President because it would stop the whole machinery of government also has not stood the test of time. *United States* v. *Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974); *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (*en banc*); *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

Federalist, No. 69 (A. Hamilton) at 445-454 (Modern Library ed.); Pet. Br. 21.

In arguing that impeachment should be the exclusive remedy for presidential misconduct, petitioners misunderstand the Framers' intentions. In adopting the Impeachment Clause, the Framers provided a mechanism which deprives a miscreant President of office but leaves any other punishment to the law. Art. I, § 3; Art. II, § 4. Thus Hamilton wrote that following impeachment and removal from office, the President "would afterwards be liable to prosecution and punishment in the ordinary course of law." *The Federalist* No. 69 at 446 (Modern Library ed.). In another paper, he stated that the President was "at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law." *Id.* No. 77 at 502. Similarly, James Iredell told the North Carolina ratifying convention that an impeached President "is further liable to a trial at common law [and] may receive such common-law punishment as belongs to a description of such offenses, if it be punishable by that law." IV Elliot, *supra* at 114. James Wilson wrote that "the trial and punishment of an offense on impeachment, is no bar to a trial of the same offense at common law." I *The Works of James Wilson* 324 (1967).

There is no indication that these references to the "common law" and to the "ordinary course of law" were restricted to criminal prosecutions. Indeed, the Framers were acutely aware that civil damage actions against government officials had been an important means of securing civil liberties in England. *Payton* v. *New York*, 100 S. Ct. 1371, 1391 (1980) (White, J., dissenting); *Marcus* v. *Search Warrant*, 367 U.S. 717, 729 (1961); *Boyd* v. *United States*, 116 U.S. 616, 624-25 (1886). It is therefore unlikely that they intended to immunize the President from such

suits at the same time that they made him subject to the law. Thus, the Court of Appeals was correct in concluding that "[b]y contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the President of the routine obligations that confine all citizens." (Pet. App. 43a.)

Another flaw in petitioners' argument is that it overlooks the Framers' intention that impeachment was designed to deal only with crimes against society or the government and not offenses against individuals. As Governor Johnston stated in the North Carolina ratifying convention:

> If an officer commits an offense against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment extends to high crimes and misdemeanors in a public office. It is a mode of trial pointed out for great misdemeanors against the public.

IV Elliot, *supra* at 48.

Wilson wrote that "impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments." I *The Works of James Wilson* 426 (1967). Consequently, "[i]mpeachments, and offenses and offenders impeachable, come not, in those descriptions, within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects. . . ." *Id.* at 324. Iredell expressed the same idea to the North Carolina ratifying convention:

> [The power of impeachment] is calculated to bring them to punishment for crime which it is not

> easy to describe, but which every one must be convinced is a high crime and misdemeanor against the government. . . .[T]he occasion for its exercise will arise from acts of great injury to the community, and the objects of it may be such as cannot easily be reached by an ordinary tribunal.

IV Elliot, *supra* at 113. *See The Federalist*, No. 65 (A. Hamilton) at 423-424 (Modern Library ed.).

Since the Framers intended that impeachment would not reach all presidential misconduct, they could not also have intended that it was the exclusive remedy for all misconduct, thereby immunizing a class of wrongs which a President might inflict on individuals but which might not call for impeachment. Such a scheme would be wholly at odds with their overriding purpose of making the chief executive personally accountable, in sharp contrast to the King of England. It would also be wholly at odds with the "very essence of civil liberty" which is "the right of every individual to claim the protection of the laws whenever he receives an injury." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The Court has recently held that it will not deprive a plaintiff of his right to pursue a damage action against a federal official arising from a violation of constitutional rights unless there is an "explicit congressional declaration that persons [so] injured. . . .may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress." *Carlson* v. *Green*, *supra*, 100 S. Ct. at 1472. Similarly, the Court should not deprive respondents of their right to sue a former President without an explicit declaration by the Framers that they intended to bar such suits.

C. Public Policy Supports Qualified Rather Than Absolte Immunity For A Former President Who Deliberately Violated The Fourth Amendment Rights Of Citizens.

Petitioner Nixon raises many of the same policy arguments in favor of absolute immunity which the Court rejected in *Economou*. However, all of the factors which led to the conclusion that cabinet officers are not entitled to absolute immunity for violations of constitutional rights are present in this case, and the fact that a former President is a defendant here should not lead to a different result in the circumstances of this case. There is a compelling need to authorize damage remedies for the abuses involved here in order to achieve the twin policies of compensation and deterrence, and there is no adequate substitute for damages in a case such as this. Moreover, since this case involves deliberate violations of constitutional rights through a surreptitious surveillance program, it raises Fourt Amendment issues that are appropriate for judicial consideration and does not enmesh the courts in reviewing presidential functions which may be outside the scope of judicial review. Furthermore, the doctrine of qualified immunity adequately protects the President in the lawful discharge of his duties.

First, this case plainly involves a massive invasion of constitutionally protected privacy which merits compensation. Petitioners used the wiretap to invade both private political discussions and intimate husband-wife conversations. Petitioner Nixon's callous indifference to respondents' rights is demonstrated by his failure to terminate the wiretap long after Morton Halperin had left the government and it was apparent that no information relating to leaks was being obtained. Constitutional rights

have been violated, respondents deserve a remedy, and there is no alternative to damages. "For people in [respondents'] shoes, it is damages or nothing." *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* 403 U.S. at 410 (Harlan, J., concurring). *See Carlson* v. *Green, supra,* 100 S. Ct. 1468; *Davis* v. *Passman,* 442 U.S. 228, 242 (1979).

Second, in addition to compensating respondents, a suit for damages against petitioner Nixon is also useful to deter future violations of individual constitutional rights at the highest level of government where the potential for abuse is the greatest. As this case amply demonstrates "the greater power of such [high-ranking] officials affords a greater potential for a regime of lawless conduct. Exten- Government operations offer opportunities for unconstitutional action on a massive scale." *Butz* v. *Economou, supra,* 438 U.S. at 506. This observation necessarily applies with greatest force to Presidents, and they should be inhibited from authorizing and utilizing unconstitutional surveillance programs. The public interest will best be served if any future President who is tempted to repeat such abuses thinks twice because of this lawsuit. "A federal official contemplating unconstitutional conduct. . .must be prepared to face the prospect of a *Bivens* action." *Carlson* v. *Green, supra,* 100 S. Ct. at 1475.[17]

Petitioners present essentially three arguments to support their contention that the special functions of the presidency require absolute rather than qualified immunity: (1) damage suits will result in an improper judicial in-

[17]The Court has also held that even if damage suits serve no general deterrent purpose, or an alternative remedy exists, a plaintiff injured by the constitutional tort of a federal official is still entitled to seek compensation. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* 403 U.S. at 397. *See id.* at 407-408 (Harlan, J., concurring).

trusion into the President's constitutional responsibilities; (2) the system of checks and balances, including Congressional oversight, the possibility of impeachment, popular elections, public opinion, media reporting, and judicial review in the form of equitable remedies are sufficient to prevent presidential abuses; and (3) even with qualified immunity, the burdens and risks of litigation are too great for the President to bear and will inhibit the fearless and decisive exercise of his authority.

1. Much of petitioners' argument concerning judicial intrusion into the President's constitutional responsibilities is an overstatement of what is involved in this case and the implications of the decisions below. All that the lower courts held, and all that this Court need hold, is that the President is not entitled to absolute immunity for deliberate violations of the Fourth Amendment rights of individual citizens. The Court has not in the past held "that every tort by a federal official must be redressed in damages," *Davis* v. *Passman, supra,* 442 U.S. at 248, and it need not so hold here.

Furthermore, by applying the functional analysis which has characterized the Court's approach to immunity questions, the Court need only focus on the President's role in authorizing surveillance programs which exceed the limitations imposed by the Fourth Amendment on the actions of all governmental officers. There may well be presidential functions for which absolute immunity from personal damages might be appropriate, even if the plaintiff pleads a constitutional violation. For example, a citizen claiming to be aggrieved by a President's commitment of troops to combat, or his negotiation of a treaty, might encounter a more substantial claim to absolute immunity than is raised here. Similarly, a suit against the President for damages alleging a pattern of racial or sexual discrimination in the

appointment of judges, ambassadors, or cabinet officers would raise different questions than does this case. Thus, this case does not raise the specter of "recurring judicial oversight of the President's discretionary actions" (Pet. Br. 33), or "a substantial intrusion into the President's constitutional responsibilities" (Pet. Br. 26), but only an adjudication that petitioners' surreptitious surveillance program exceeded the restraints imposed by the Fourth Amendment and resulted in a massive invasion of respondents' rights of privacy and free expression.[18]

When a President abuses his power by violating the constitutional rights of a citizen, the courts have a duty to vindicate those rights, and the doctrine of separation of powers is not to the contrary. As the court recently stated:

> At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department" *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional

[18]There is a logical inconsistency in petitioners' argument that damage actions will improperly embroil the judiciary in review of Presidential action. Petitioners argue that damage actions are unnecessary because, among other constraints, "the existence of judicial review of presidential actions serves to contain and correct the unauthorized exercise of the President's powers." (Pet. Br. 31, footnote omitted.) But such review involves as much judicial oversight of presidential action as a suit for damages. If respondents had learned of the wiretap on their telephone while it was in progress and had sued for injunctive and declaratory relief, the courts would have been drawn into evaluating the reasonableness of the President's action to at least as great a degree as they are in this damage action. Thus, it cannot be judicial oversight to which petitioners object, for they profess to welcome it (Pet. Br. 31) so long as it does not entail money damages.

> rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Davis v. *Passman supra,* 442 U.S. at 242. *See Marbury* v. *Madison, supra,* 5 U.S. (1 Cranch) at 163. Such judicial vigilance for constitutional rights is entirely consistent with James Madion's purpose when he offered the Bill of Rights to the First Congress: "If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights. . . ." 1 Annals of Congress 439 (1789).

Moreover, the doctrine of separation of powers is not intended to foster unreviewable independence or to exalt any officer of the government, but rather to distribute and control power throught checks and balances.

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental power among three departments, to save the people from autocracy.

Myers v. *United States,* 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Thus, vindication of constitutional rights through damage actions in the courts serves rather than frustrates the separation of powers doctrine. This Court has determined in *Economou* that damage actions are an effective means of fencing in executive power when it

threatens the constitutional rights of individual citizens, and that determination applies with full force when the violator is a former President.

Because petitioners assert that the Halperin wiretap was conducted for legitimate national security purposes, they contend that the courts should not impose "even the slightest inhibition on the vigorous and resolute discharge of the President's constitutionally based responsibilities." (Pet. Br. 37-40.) In their view, leaks to the press seriously interferred with the conduct of foreign policy, and the wiretap program was necessary to stem the leaks. (Pet. Br. 1-3.)[19] However, this Court, has stated that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker* v. *Carr*, 369 U.S. 186, 211 (1962). Consequently, even legitimate claims of national security have not dissuaded this Court from adjudicating constitutional rights.[20] Indeed, "even the war power does not remove constitutional limitations safeguarding essential liberties." *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 426 (1934).

The instant case does not present foreign affairs questions such as who is the lawful sovereign or representative of a foreign country, or whether a treaty requires the President to order troops to a foreign country, but rather the question of whether the invasion of the Halperins'

[19]Whether, contrary to the findings of all the Congressional investigations into this program *(see* pp. 1-2, *supra)*, the Halperin wiretap was conducted to investigate leaks is a disputed issue in this case.

[20]*E.g. United States* v. *United States District Court*, 407 U.S. 297 (1972); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *United States* v. *Robel*, 389 U.S. 258 (1967); *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1851); *Little* v. *Barreme*, 6 U.S. (2 Cranch) 169 (1804).

privacy violated the Constitution. *See Zweibon* v. *Mitchell,* 516 F.2d 594, 623-624 (D.C. Cir. 1975) *(en banc), cert. denied,* 425 U.S. 944 (1976). Such a question requires vigilance rather than deference from the courts and is surely not one entirely exempt from judicial inquiry, as petitioners urge.[21].

2. Petitioners' suggestion that a President is sufficiently constrained by such checks and balances as congressional oversight, the possibility of impeachment, popular elections, public opinion, media reporting, and judicial review overlooks the obvious fact that none of these mechanisms deterred petitioner Nixon from the conduct which led to this action. This failure eloquently testifies to the wisdom of an additional check in the form of a damage remedy for those whose constitutional rights are violated. Furthermore, none of the mechanisms mentioned by petitioners would afford any compensation to respondents. They are not remedial safeguards of an individual's rights, like appeals to correct prosecutorial or judicial misconduct, which justify absolute immunity for judges and prosecutors in their courtroom roles.

Moreover, with the exception of elections, all of these constraints are also applicable to other executive branch officers, but that did not lead the Court in *Economou* to conclude that damage actions are unnecessary. The impeachment clause of the Constitution applies to all "civil officers of the United States," Art. II, § 4, yet that fact did not alter this Court's decision in *Economou* that federal

[21]There is also great irony in petitioners' suggestion that this case calls for extreme judicial deference on national security grounds. The White House wiretapping program represents as vividly as any other recent event the executive branch's proclivity to label matters "national security" in order to escape scrutiny of its actions. (Report of the House Committee on the Judiciary: Impeachment of Richard M. Nixon, *supra* at 146.)

executive officials should be subject to damage actions for conduct which violates constitutional rights. *See Nixon* v. *Sirica*, 487 F.2d 700, 711 n.50 (D.C. Cir. 1973) (*en banc*). Thus, the checks on which petitioners would exclusively rely do not displace the role that a private damage action plays.

It is also unrealistic to believe that the great engines of impeachment, a national election, or even congressional oversight will deter a President's unlawful actions toward one individual or family. These mechanisms are better gauged for wide-ranging abuses against our system of government itself than for the violation of one family's rights. If Mr. Nixon's only offense had been the wiretap of the Halperin telephone without all the other abuses associated with Watergate, it is most unlikely that the impeachment process would have begun. Indeed, the Framers never contemplated that impeachment would reach all personal injuries. *See* pp. 37-38, *supra*. Similarly, elections reflect the popular will which may well applaud the invasion of the constitutional rights of unpopular individuals, yet the Bill of Rights was designed precisely to restrain such abuses, particularly when they are tolerated or encouraged by the majority. The individual suit for damages is therefore a valuable and necessary complement to the arsenal of checks and balances which preserves the integrity of official conduct and protects constitutional rights in this country.

3. Petitioners' final policy justification for absolute presidential immunity is that the inhibitory effect of potential litigation and liability are too great for the President to bear even though he may rely on an extensive qualified immunity. Again it is important to remember that the only actions which will be inhibited are those which violate clearly established individual constitutional rights. Rather than being confronted with "vast potential

liability . . . for virtually every presidential decision" (Pet. Br. 27), a President will only be threatened with personal liability when he violates an individual's constitutional rights. With the inhibition so limited, there is no reason why the balance struck in *Economou* for cabinet officers should be struck differently for Presidents.[22]

Petitioners also substantially overstate the likelihood that a President actually will be distracted and burdened by defending a damage action. First, it should be remembered that the doctrine of qualified immunity is available "in varying scope . . . the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer* v. *Rhodes, supra,* 416 U.S. at 247. Under this sliding scale of immunity, the President is entitled to the maximum degree of protection because of the breadth of his discretion, the responsibilities of his office, and the speed with which he must act in pressing circumstances.

The ease with which petitioner Nixon has escaped the toils of litigation with an early motion for dismissal is demonstrated by the cases cited by petitioners at page 25 of their brief. In those cases, the plaintiffs failed to demonstrate that the President was a proper party to the suit. Only in rare occasions like this suit, where it is clear that the President is a proper defendant because of his direct personal involvement, is he likely to lose a motion

[22]As the Court of Appeals correctly noted, "there seems to be no basis for greater solicitude for the personal finances of a President ordered to pay damages for his constitutional violations than for a governor or a cabinet officer." (Pet. App. 48a.) Therefore, if the balance is to be struck differently for a President than for a cabinet officer, the difference must be justified in terms of the office rather than the individual's personal interests. *See* Pet. Br. 26.

for dismissal or summary judgment and be required even to respond to discovery. *See Butz* v. *Economou, supra,* 438 U.S. 507-508. In this case, Nixon publicly accepted responsibility for the wiretap program, and depositions of more than twenty other parties and witnesses demonstrated that he was directly involved before he was joined as a defendant. *Halperin* v. *Kissinger,* 401 F. Supp. 272 (D.D.C. 1975). Moreover, damage suits do not appear to have presented serious problems for either former President Ford or President Carter:

> According to presidential counsel Lloyd Culter's office, Mr. Carter hasn't been named in any suits for personal damages except those in which the president is cited along with a number of other defendants and quickly dismissed from the case. Mr. Ford's lawyer, Dean Burch, of Pierson, Ball & Dowd, of Washington, D.C., said the former president has been slapped with a number of suits relating to his pardon of Mr. Nixon, but "To be candid I just refer them to Justice and don't worry about them." None of the suits has survived summary judgment.

"Nixon Ready To Testify," The National Law Journal, 27 (Sept. 29, 1980).

When litigation follows departure from office – as has been the pattern with petitioner Nixon – it does not intolerably distract a President from the discharge of duties. However, if a suit against an incumbent survived preliminary motions and required responses to discovery, the district courts have broad power to regulate such discovery to avoid undue burden on a party. Rule 26(c), Fed. R. Civ. P. A sitting President can, without doubt, expect the greatest deference under this provision. Indeed, to the extent it might be necessary for an incumbent to par-

ticipate in litigation, the district court could stay those proceedings until he left office.

Even if an incumbent were required to respond to discovery, the burden would not be as great as petitioners suggest. In this case Dr. Kissinger defended himself while performing his duties as Secretary of State. By agreement with the plaintiffs (I J.A. 26), he responded to discovery first by providing answers to interrogatories (I J.A. 309-354) and then by submitting to a deposition that lasted less than three hours. (II J.A. 192, 254). There is no indication that those burdens of litigation detracted from his performance as Secretary of State. Moreover, from the earliest days of the Republic to the present, courts have demonstrated consideration and ingenuity to alleviate the burden on Presidents whose testimony has been required. In 1818, President Monroe was subpoenaed to appear at a court martial but was permitted to file answers to written interrogatories. *Nixon* v. *Sirica, supra,* 487 F.2d at 710 n 42. In 1975, President Ford was permitted to testify at a trial through videotape. *United States* v. *Fromme,* 405 F. Supp. 578 (E.D. Cal. 1975). Similar procedures can also be used if an incumbent is ever required to appear as a defendant in a civil damage action.

Petitioners also contend that litigation against a President is inappropriate because it will inevitably violate either the "presumptive privilege for Presidential communications," *United States* v. *Nixon,* 418 U.S. 683, 708 (1974), or the absolute privilege for state and military secrets, *United States* v. *Reynolds,* 345 U.S. 1 (1953). Like the "disruption of duties" argument, this is mere speculation with no basis in the facts of this litigation. Despite the taking of 1900 pages of depositions, it was not necessary to litigate a single claim of privilege, other than Mr. Nixon's broadscale objection to testifying at all. This case has

involved no classified material whatsoever, except for Nixon's gratuitous reference in his deposition to a few bits of classified information which none of the parties have sought to rely on and which were filed under seal by agreement. (II J.A. 36.)

The privilege for presidential communications is based on the need for candid advice, *United States* v. *Nixon, supra,* 413 U.S. at 705-706, and even though cabinet officers and state governors need candid advice, that has not been a sufficient reason to afford them absolute rather than qualified immunity. *Butz* v. *Economou, supra,* 438 U.S. 478; *Scheuer* v. *Rhodes, supra,* 416 U.S. 232. Moreover, since the privilege for presidential communications "calls for great deference from the courts," *United States* v. *Nixon, supra,* 418 U.S. at 706, it can be outweighed only by the strongest showing that requested information is necessary for "the legitimate needs of the judicial process." *Id.* at 707. The state secrets privilege, on the other hand, is absolute, *United States* v. *Reynolds, supra,* 345 U.S. 1, so that if it is properly raised and upheld it cannot be outweighed by even the strongest showing of need. *See Halkin* v. *Helms,* 598 F.2d 1 (D.C. Cir. 1979). Accordingly, there is no danger that information falling within this privilege will be disclosed.

* * *

It is clear that none of petitioners' policy arguments warrant absolute immunity. On the other hand, the most profound policy reason for rejecting absolute immunity was identified by the Court in *Economou:*

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> "No man in this country is so high that he is above the law. No officer of the law may set

> that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

438 U.S. at 506, *quoting United States* v. *Lee*, 106 U.S. 196, 220 (1882). Accordingly, the decision of the Court of Appeals rejecting absolute presidential immunity should be affirmed.

II. EVEN IF PETITIONER NIXON IS ENTITLED TO ABSOLUTE IMMUNITY, PETITIONERS KISSINGER, MITCHELL, AND HALDEMAN ARE NOT.

Petitioners Kissinger, Mitchell, and Haldeman urge that if the President is entitled to absolute immunity, then they too should enjoy the same protection because they were acting at the President's direction. This argument fails to recognize the distinct role each petitioner played in the Halperin wiretap and the distinct claims against them. Furthermore, such a derivative theory of immunity is as "contrary to the course of decision in this Court" as was the claim that all federal officials enjoy absolute immunity. *Butz* v. *Economou, supra,* 438 U.S. at 487.

Kissinger, Mitchell, and Haldeman seek to portray themselves as mere agents executing Nixon's explicit orders to wiretap Morton Halperin. To the contrary, each of them had wide discretion in the wiretap program, each was solely responsible for actions that contributed to the invasion of respondents' privacy, and each, at one time or another, could have prevented or ended the wiretap. Their concession that they "undoubtedly exercised some discretion in carrying out the President's directives" (Pet. Br. 47 n.40) is an understatement that borders on misstatement.

The record indicates that, while Nixon authorized and oversaw the wiretap program as a whole, the selection of targets was left to Kissinger, and he instructed his deputy, Col. Haig, to provide Halperin's name to the FBI. Furthermore, Kissinger requested the FBI to continue the wiretap on Halperin even when he agreed to the discontinuance of others, and the documentary evidence plainly demonstrates that the FBI regarded Kissinger as centrally responsible for the program. As Mitchell stated in his deposition, "Dr. Kissinger, having initiated the taps, that [sic] it would be his determination as to when they came off." (II J.A. 166; *See* II J.A. 46.) Since Kissinger had the authority to provide the names of those to be tapped and the authority to terminate the taps, he is sued for his role in targeting Halperin, for failing to terminate the wiretap, and for reviewing and utilizing the information obtained through the wiretap.

The basis of Mitchell's liability was spelled out clearly by the District Court. (Pet. App. 71a, 73a.) Nixon directed that the wiretaps were to be conducted by the FBI under Mitchell's supervision after Kissinger furnished the names of targets. (II J.A. 19-20, 60-63, 160.) Mitchell signed the authorization for the Halperin wiretap even though it did not contain the information required by Department of Justice regulations to justify a warrantless surveillance. Thereafter, he occasionally received copies of the summary letters. "At no time did he formally re-evaluate the fruits of the wiretap or the need for its continuance, as required by Justice Department regulations." (Pet. App. 71a.) Similarly, Haldeman is sued, *inter alia*, for having reviewed the wiretap material for over a year without recommending termination and for having disseminated the material for purposes unrelated to the tap's original justification. (Pet. App. 73a.) Contrary to petitioners' insistence (Pet. Br. 47-50), the suit against Kissinger, Mit-

chell, and Haldeman is not based on the advice they gave the President to establish the surveillance program but on their actions within their independent spheres of responsibility.

Moreover, there is no basis in law for derivative immunity, except in the most unusual circumstances. This Court has consistently held that officials are not immunized from liability for damages when they follow orders from superiors who may enjoy immunity. In *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881), the Court held that the Speech or Debate Clause afforded absolute immunity to members of the House of Representatives who voted for a resolution authorizing the arrest and imprisonment of Kilbourn for his refusal to respond to the questions of an investigating committee, even though the Court held that the authorization was in excess of the House's authority. The Court did not, however, extend this absolute immunity to the Sergeant-at-Arms of the House who actually arrested and jailed Kilbourn, and he was required to stand trial in a civil suit for these torts. If petitioners' theory of derivative immunity were sound, the Sergeant-at-Arms would have been entitled to avail himself of the absolute immunity which protected the members of the House.

Consistent with the rejection of derivative immunity in *Kilbourn,* the Court in modern times has adhered to "the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts." *Powell* v. *McCormack,* 395 U.S. 486, 504 (1969). *Accord, Doe* v. *McMillan,* 412 U.S. 306, 315-317 (1973); *Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967); *McSurely* v. *McClellan,* 553 F.2d 1277 (D.C. Cir. 1976) (*en banc*), *cert. dismissed as improvidently granted,* 438 U.S. 189 (1978). *See Gravel* v. *United*

States, supra, 408 U.S. at 618-621 Similarly, even if the President enjoys absolute immunity, his aides who participate in unconstitutional activity still are responsible for their discretionary acts and do not enjoy derivative immunity.

III. PETITIONERS ARE NOT ENTITLED TO PREVAIL ON THEIR MOTION FOR SUMMARY JUDGMENT ON EITHER THEIR QUALIFIED IMMUNITY DEFENSE OR THE DOCTRINE OF NON-RETROACTIVITY.

Petitioners contend that at the time of the Halperin wiretap the constitutional standards pertaining to national security wiretaps were unsettled. From this assertion they raise two closely related defenses. First, they contend that they are entitled to prevail under the doctrine of qualified immunity because they did not violate any clearly established law of which they should have known. Second, petitioners contend that the decisions below unfairly impose liability by retroactively applying decisions which clarified the status of national security wiretaps under the Fourth Amendment. *United States* v. *United States District Court,* 407 U.S. 297 (1972); *Zweibon* v. *Mitchell,* 516 F.2d 594 (D.C. Cir. 1975) *(en banc), cert. denied,* 425 U.S. 944 (1976).

These contentions are without merit for three reasons which are detailed below but can be briefly summarized. First and foremost, there is a sharp factual dispute, which cannot be resolved on respondents' motion for summary judgment, over whether the Halperin wiretap was undertaken for national security purposes or for political reasons. If, as respondents contend, the Halperin wiretap was initiated and continued for poltical purposes unrelated to bona fide national security interests, then it

plainly violated Fourth Amendment strictures which were settled in 1969. Petitioners cannot escape the requirements of the Fourth Amendment by labeling a political wiretap a national security wiretap. Thus, the factual predicate for petitioners' qualified immunity and retroactivity arguments has not been established on their motion for summary judgment.

Second, petitioners violated law that was clearly established in 1969 by failing to observe the reasonableness requirement of the Fourth Amendment. Thus, the legal predicate for petitioners' qualified immunity and retroactivity arguments is missing. Third, qualified immunity is an affirmative defense which requires a showing that the defendant acted in good faith. Although the Court of Appeals decision gives petitioners ample opportunity to make this showing on remand, the Court properly ruled that it has not yet been established on their motion for summary judgment.

A. On A Motion For Summary Judgment, The Court Cannot Assume That The Halperin Wiretap Was Conducted For Valid National Security Purposes.

When this Court first applied the Fourth Amendment to nontrespassory wiretapping in *Katz* v. *United States,* 389 U.S. 347 (1967), it reserved judgment on whether the Fourth Amendment requires court-authorized warrants for national security wiretaps. *Id.* at 358 n.23[23] If the Halperin surveillance was not conducted for national security purposes, petitioners plainly violated clearly

[23]Footnote 23 in *Katz* states: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case."

established law when they initiated and continued the wiretap without a warrant.

Since petitioners seek to prevail under the doctrines of qualified immunity and non-retroactivity on a motion for summary judgment, the evidence relating to the purpose of the wiretap must be viewed in the light most favorable to respondents. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Respondents contend that from the outset the tap was conducted for political reasons rather than to investigate unauthorized disclosures of classified information. There is, moreover, more than enough evidence in the record to support the Court of Appeals' refusal to resolve the dispute about the purpose of the wiretap on a motion for summary judgment. For example, there was only speculation tying Halperin to the leaks (I J.A. 173), and Kissinger knew that Halperin had no access to the published information on the Cambodian bombing raids. The record also demonstrates that Kissinger had been criticized for hiring Halperin (I J.A. 330-331; II J.A. 167-169, 196-199), and that on the same day Kissinger selected Halperin as a wiretap target, he also cut off Halperin's access to sensitive information so that he could not be the source of subsequent leaks. (I J.A. 214-215.) This evidence supports respondents' contention that Kissinger selected Halperin in order to bolster his own standing and deflect the criticism over his staff appointments.[24]

[24]There is also reason to question whether the entire wiretap program was initiated to investigate leaks. FBI records "reveal no case [between 1960 and 1972] in which the source of any leak was discovered by means of electronic surveillance." Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities, S. Rep. 94-755, 94th Cong., 2d Sess., Book III, 321 (1976). Therefore, it is doubtful that in 1969 Hoover would have recommended wiretapping as "an effective method of determining the source of leaks." (Pet. Br. 2.) Further-

The leak investigation rationale has progressively less credibility for each day the wiretap continued. Throughout the entire life of the surveillance, petitioners obtained no information shedding any light on leaks, and the FBI officials conducting the surveillance made several recommendations to terminate it. (I J.A. 176, 183, 184, 206.) From the day the tap began, Halperin had no access to sensitive information, and four months later he resigned from the NSC staff. (I J.A. 214-215.) At that time, he became a consultant to the NSC, a job that involved no access to any classified information, and in May 1970 he resigned from that position. (I J.A. 216.) Thereafter, Halperin became increasingly involved in anti-war lobbying and the presidential campaign of Senator Muskie *(id.)*, and as the District Court found, there was "a seemingly political motive for the later surveillance and dissemination of reports." (Pet. App. 74a. *See* I J.A. 252-256.)

In view of this record, the Court of Appeals properly ruled that the District Court must determine the issue of whether the wiretap had a bona fide national security purpose. (Pet. App. 26a-28a.) Until that sharply disputed issue is settled, the factual predicate for petitioners' qualified immunity and retroactivity defenses is absent.[25]

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more, Nixon stated that he had always known that wiretapping was ineffective for that purpose: "The tapping was a very, very unproductive thing. I've always known that. At least, I've never, it's never been useful in any operation I've ever conducted." Statement of Information, House Committee on the Judiciary, 93d Cong., 2d Sess., Book VII, Pt. 4, 1754 (1974).

[25]To establish that a warrant was not required, petitioners must prove (1) that the Halperin wiretap was in fact a leak investigation, and (2) that leak investigations unrelated to foreign intelligence activities fall within the national security area reserved in *Katz*. Just as the Court of Appeals ruled in the unchallenged portion of its opinion that the national security proviso to Title III does not cover the Halperin wiretap unless it was conducted to protect national security information from foreign intelligence activities (Pet. App. 21a-28a), the *Katz* national

B. The Court of Appeals Correctly Held That Petitioners Violated Established Law By Failing Even To Attempt To Conduct The Halperin Surveillance In Compliance With The Reasonableness Requirement Of The Fourth Amendment.

There can be no doubt that it was established in 1969 that the reasonableness requirement of the Fourth Amendment applied to all wiretaps and that the Halperin surveillance violated this requirement, as the courts below found. Therefore, even if petitioners reasonably could have believed that a warrant was not required to initiate the Halperin wiretap, they cannot avoid liability for the unreasonable conduct of the surveillance under their theories of qualified immunity as a matter of law and non-retroactivity.

The Fourth Amendment contains "two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause." *Payton* v. *New York, supra,* 100 S. Ct. at 1379. It has long been recognized that "[t]he general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment." *Id.* at 1379 n.23, *quoting* Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 103 (1937).

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security proviso also would not cover the wiretap unless foreign espionage was involved. *See Giordano* v. *United States,* 394 U.S. 310, 314 (1969) (Stewart, J., concurring).

In *Olmstead* v. *United States,* 277 U.S. 438 (1928), the Court held that the Fourth Amendment did not prohibit non-trespassory electronic surveillance. However, in 1967, the Court explicitly overruled *Olmstead* and held that the Fourth Amendment protects the privacy of telephone conversations even from non-trespassory electronic surveillance. *Katz* v. *United States, supra,* 389 U.S. 347. Therefore, after *Katz,* all wiretapping was subject to the reasonableness requirement of the Fourth Amendment. Since *Katz* left open only the applicability of the Fourth Amendment warrant requirement, 389 U.S. at 358 n.23, there was not the slightest doubt that this wiretap, like all others, had to be reasonable.

The elements of Fourth Amendment reasonableness had been clearly spelled out prior to 1969 in the Court's decisions delineating permissible procedures for the conduct of electronic surveillance. In *Osborn* v. *United States,* 385 U.S. 323, 329-330 (1966), the Court condoned the use of an electronic surveillance device that was confined to "precise and discriminate circumstances. . . .for the narrow and particularized purpose of ascertaining the truth" of allegations of wrong-doing. In *Berger* v. *New York,* 388 U.S. 41, 57-60 (1967), the Court held that the Fourth Amendment requires that an electronic surveillance must be based on probable cause that a particular offense has been or is being committed. Application of these principles to national security wiretaps therefore requires that the surveillance be conducted for the purpose of obtaining national security information and that there be probable cause to believe that such information will be obtained.

Berger also held that in order for a surveillance to be reasonable, it must be aimed at specific communications relevant to the investigation and not be "a roving commission to 'seize' any and all conversations." 388 U.S. at 59. The surveillance must be minimized to avoid interception

of non-pertinent conversations of the target and conversations of other persons unrelated to the investigation. The surveillance must also be limited in time, and there must be periodic renewals based on new showings of present probable cause for the continuation of the surveillance. *See Katz* v. *United States, supra,* 389 U.S. at 354-357.

With respect to the Halperin wiretap, summary judgment in petitioners' favor is inappropriate as to each one of these clearly established elements of reasonableness. First, the record indicates that the wiretap could have been undertaken for improper political purposes rather than to serve any legitimate intelligence purpose. Second, there was no probable cause but only "speculation" to believe that Halperin was leaking classified information (I J.A. 173), and he had no access to the information concerning the secret bombing raids in Cambodia which appeared in the New York Times and triggered the wiretap. (I J.A. 214.) Furthermore, the FBI memo to the Attorney General requesting authorization to tap Halperin stated that previous investigations "did not disclose any pertinent derogatory information." (I J.A. 177.)

Third, there were no reviews of the propriety or necessity of the surveillance during its twenty-one month life — even though Department of Justice regulations for national security wiretaps required reviews and reauthorizations every ninety days (II J.A. 134-135) — and petitioners have conceded that they knew that the wiretap was producing no information relating to leaks. In Nixon's words, it amounted to "just gobs and gobs of material: gossip and bull. . . ." (Statement of Information, House Committee on the Judiciary, *supra,* Book VII, Pt. 4, 1754; II J.A. 98-99.) In Haldeman's view, there was "a substantial amount of irrelevant information." (II J.A. 301.) According to Haig, Kissinger's deputy, much of what was reported was "garbage." (Haig Dep. 38.) In Kissinger's,

view, "very rarely did anything come in that was significant." (II J.A. 235.) Indeed, Kissinger concluded that the tap never produced any information indicating that Halperin was responsible for any leaks or casting any doubt on Halperin's "discretion or loyalty." (II J.A. 248, 253.) Nonetheless, petitioners never considered removing the tap (II J.A. 98, 100, 239, 240, 245, 291, 301, 308; Ehrlichman Dep. 24, 39-40; Haig Dep. 38.), and it ended only because the entire program was discontinued. (Report of the House Committee on the Judiciary, *supra* at 148-149.)

Fourth, there were no efforts to minimize the interception of conversations unrelated to leaking, and many irrelevant conversations were seized. The FBI monitors listened to all calls and logged 638 of them. Forty-three per cent of these were between third parties and Ina Halperin. Twenty-seven percent of the logged calls were husband-wife conversations between Ina and Morton Halperin. Only twenty eight per cent of the logged calls were between Morton Halperin and third parties, and these were not limited to conversations which touched on foreign policy issues and which conceivably could have led to the unauthorized disclosure of classified information. Even calls of the three Halperin children were logged on occasion.

To be sure, the requirements of Fourth Amendment reasonableness may vary depending on the circumstances of the surveillance. *Scott* v. *United States*, 436 U.S. 128 (1978); *United States* v. *United States District Court*, 407 U.S. 297, 320 (1972). Here, however, petitioners made no effort whatsoever to minimize the scope or the duration of the surveillance. The Halperin wiretap was a deliberate and indiscriminate seizure of the "conversations of all persons. . . covered by the device." *Berger* v. *New York*, *supra*, 388 U.S. at 59. It was an unconstitutional general

search initiated and continued without probable cause or any effort at minimization. By their utter disregard for the reasonableness requirement of the Fourth Amendment, petitioners violated principles that were clearly established in 1969, and therefore they cannot prevail as a matter of law on qualified immunity or non-retroactivity grounds.

C. Petitioners Have Failed To Establish The Absence Of Genuine Factual Disputes As To Whether They Conducted The Halperin Wiretap In Good Faith And Therefore They Are Not Entitled To Qualified Immunity.

In order to prevail under the affirmative defense of qualified immunity, petitioners must not only demonstrate that they violated no clearly established law, but also that they acted in good faith without an improper motive, a deliberate intention to injure respondents, or a reckless disregard for respondents' interests. *Gomez* v. *Toledo,* 100 S. Ct. 1920, 1924 (1980); *Procunier* v. *Navarette,* 434 U.S. 555, 561-562 (1978); *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975); *Scheuer* v. *Rhodes, supra,* 416 U.S. at 247-248. The Court of Appeals properly remanded the case for further proceedings because it could not find that petitioners established the requisite good faith on their motion for summary judgment. Petitioners, however, contend that they should not be required to make any showing of good faith. (Pet. Br. 61-62.)[26]

[26]With the exception of the District Court's finding that petitioners did not establish good faith with respect to the continuation of the surveillance, they will have an opportunity to go forward with this defense as to all other aspects of respondents' claims. As a practical matter, very little is foreclosed on remand since petitioners will have an opportunity to establish a good faith defense to respondents' statutory claims and to the Fourth Amendment warrant issue, and to litigate the question of precisely when the wiretap became unreasonable. Furthermore, petitioner Kissinger has an opportunity to prove a good faith defense to all aspects of respondents' claims since the District Court's prior ruling did not apply to him.

In *Gomez* v. *Toledo*, the unanimous Court stated that "[t]he applicable test focuses not only on whether the official has an objectively reasonable basis for [his good faith] belief, but also whether '[t]he official himself [is] acting sincerely and with a belief that he is doing right." 100 S. Ct. at 1924. In *Scheuer* v. *Rhodes*, the Court held: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, *coupled with* good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U.S. at 247-248 (emphasis added). In *Wood* v. *Strickland, supra*, 420 U.S. at 322, supra, the Court held that a school official is not entitled to qualified immunity if he "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the rights of the student affected, *or* if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." (emphasis added). The Court has also held that this same rule applies to federal officials, including cabinet officers. *Butz* v. *Economou, supra*, 438 U.S. at 498.[27]

A defendant cannot establish this subjective component of the qualified immunity defense if he "acted with such an

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[27]Petitioners rely heavily on *Procunier* v. *Navarette, supra*, 434 U.S. 555, for their contention that they need only show that they violated no clearly established law. (Pet. Br. 51.) *Procunier* involved an allegation that prison officials had negligently interferred with the constitutional rights of a prison inmate by failing to mail his correspondence. 434 U.S. at 556-559. The Court found that defendants were entitled to immunity under the first branch of the qualified immunity defense because a prisoner's right to free use of the mail had not been clearly established at the time of the alleged conduct. Notwithstanding this finding, the Court also addressed the second branch of the *Wood* v. *Strickland* standard. *Id.* at 566. However, the Court was able to find that defendants could not have intended to injure the plaintiff because they were only alleged to have negligently interferred with his mail. *Id.*

impermissible motivation or with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith," *Wood* v. *Strickland, supra,* 420 U.S. at 322, or if he "exhibit[ed] deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim. . . ." *Procunier* v. *Navarrette, supra,* 434 U.S. at 568 (Burger, C.J., dissenting). *See Butz* v. *Economou, supra,* 438 U.S. at 492 n.17. Therefore, even if an official can demonstrate that the rights which he is alleged to have violated are not clearly established, he still must demonstrate that he acted without an impermissible motivation or deliberate indifference to the risk of injuring the plaintiff.[28] In this case, the evidence of political rather than legitimate national security purposes behind the Halperin wiretap and of petitioners' indifference to the violation of respondents' privacy is sufficiently strong to preclude a finding of good faith on their motion for summary judgment.

Seeking to reverse this Court's recent precedents, petitioners suggest that the requirement of establishing good faith should be eliminated with respect to the President and those acting for him. (Pet. Br. 61.) This suggestion to radically revise the qualified immunity defense is unwarranted. In *Butz* v. *Economou, supra,* 438 U.S. at 507, the Court held that the qualified immunity defense was sufficient protection for federal executive officers up to the cabinet level. For all of the reasons set forth at pp. 39-54, *supra,* there is no need to fashion a different rule for the President. Under the sliding scale of qualified immunity, which increases the protection afforded officials according

[28]Conversely, if the official violated clearly established rights of which he knew or should have known – as appears to be the case here – he will be deprived of qualified immunity irrespective of any showing of good faith.

to the scope of their responsibilities and discretion, the President's burden of establishing good faith usually will be minimal and can be overcome only by the strongest showing of impermissible motivation, intent to cause harm, or reckless disregard for the consequences of his actions. The opportunity is open to petitioner Nixon to make the requisite showing on remand, and there is no need to change well-established rules.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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Dated: October 31, 1980

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MICHAEL RODAK, JR., CLERK

No. 79-880

In the Supreme Court of the United States

OCTOBER TERM, 1980

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

Respondents begin their brief (Halperin Br. 1-13) with a lengthy statement of their factual contentions in this case. Although we believe that recitation to be largely irrelevant to the proper disposition of the legal issues presented here, we feel obliged to respond briefly at the outset to their discussion.

Respondents err in repeatedly asserting (Halperin Br. 1-2, 6, 24-25, 54, 57, 60, 62-65) that the wiretap program was not initiated for legitimate reasons of national security and foreign policy. As discussed in our opening brief, the district court found (see Pet. Br. 8), as fully supported by the record (see Pet. Br. 1-4), that the surveillance was instituted to investigate leaks that jeopardized the national security and foreign policy of the

United States. Moreover, respondents incorrectly suggest (Halperin Br. 4-6, 56, 60) that the surveillance sought only to uncover the source of the leaks concerning bombing missions in Cambodia. However, that was merely the latest in a long series of leaks, and the wiretap program was directed to these recurring breaches of government secrecy (see Pet. Br. 2-4). Morton Halperin, as Chief of the National Security Council Planning Group, had access to such leaked information (I J.A. 223; II J.A. 222-223).

Respondents also err in their failure to address separately the specific and distinct responsibilities performed by each petitioner with respect to the Halperin wiretap. For example, respondents assert (Halperin Br. 8) that "petitioners rejected suggestions from experienced officials of the FBI that the tap be terminated." See also Halperin Br. 57. But the record evidence cited by respondents shows that these matters were primarily the subject of internal discussions within the FBI, and nothing indicates that any of the petitioners were personally aware of or disapproved this advice.

Similarly, respondents state (Halperin Br. 8) that "petitioners never reconsidered the propriety of the Halperin wiretap, even though Department of Justice regulations required that an authorization for a national security wiretap be renewed every 90 days." See also Halperin Br. 39, 60. As explained in our opening brief (Pet. Br. 4), however, President Nixon directed that the wiretaps be terminated as soon as they were no longer necessary, and all of the petitioners relied on the FBI to conduct the wiretaps, including their actual operation and termination, in accordance with all applicable legal requirements.[1]

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[1] Contrary to respondent's suggestion, the Department of Justice regulations did not put the burden on the Attorney General to monitor all outstanding national security wiretaps to ensure that none extended beyond 90 days. Rather, such wiretaps were to cease at the end of 90 days unless a renewal was requested from and authorized by the Attorney General. See Pet. Br. 4-5 n.7; II

In the same way, respondents contend (Halperin Br. 61) that "there were no efforts to minimize the interception of conversations unrelated to leaking" and that "petitioners made no effort whatsoever to minimize the scope or the duration of the surveillance." See also Halperin Br. 9-10. But as discussed above, such matters of implementation were left to the FBI as the expert in the surveillance area and were not overseen by petitioners personally. Indeed, petitioners were sent summaries of only a few of the calls that were intercepted or logged (I J.A. 248-249, 251, 264, 343, 345-346; II J.A. 50-53, 162, 163, 166-167, 170-171, 213-214, 238, 246-249, 312-314).[2]

Viewed in the light of their individual roles, petitioners cannot be held personally accountable for every aspect of executing the Halperin wiretap. Any suggestion of group culpability or vicarious liability in this case is entirely inappropriate and unwarranted.

J.A. 134-135, 138. Since Attorney General Mitchell did not regularly receive the surveillance reports on the Halperin wiretap and apparently did not personally see those few reports that were sent to his office after the expiration of the 90-day period (II J.A. 162, 163, 166-167, 170-171), the FBI's continued surveillance in violation of Department of Justice regulations did not come to his attention. The FBI's failure to comply with the 90-day requirement here may have resulted from Director Hoover's perception that this was "a White House project, not an F.B.I. project. And the specific rules that must be applied to F.B.I. projects would not necessarily be applied to a White House project" (Sullivan Dep. 191-192; see also *id.* at 89).

[2] Notwithstanding respondents' characterization that these wiretaps produced no useful information concerning the leaks (Halperin Br. 10, 56 n.24, 57, 60-61), we note that "[i]n one instance one of those people [with whom Mr. Halperin was in close contact] was a very, very prime suspect for espionage activity" and was "alleged * * * informally to have been an agent of a foreign government" (Haig Dep. 96, 101), and that other wiretaps led to the identification of one person who had been responsible for certain leaks and were significant in the investigation of other leaks (Haig Dep. 58-59). See also II J.A. 332-333 (Haldeman explanation of Clifford article).

I. THE PRESIDENT AND HIS CLOSEST ADVISORS ARE ABSOLUTELY IMMUNE FROM PERSONAL DAMAGES LIABILITY FOR DECISIONS MADE IN THE EXERCISE OF THE PRESIDENT'S OFFICIAL AUTHORITY

A. Respondents' Arguments Have Been Rejected By This Court As Insufficient To Deny Absolute Immunity In Other Contexts And Do Not Support The Conclusion That The President, In Contrast To The Constitutional Officers Of The Legislative And Judicial Branches, Should Be Denied Absolute Immunity

In our opening brief (Pet. Br. 18-44), we demonstrated that the principle of separation of powers and the "special functions" of the presidency (*Butz* v. *Economou*, 438 U.S. 478, 508 (1978)) require that the President of the United States be accorded an absolute immunity from personal damages liability arising out of the exercise of his official duties. This immunity is necessary "to protect the decisionmaking processes of" the President (438 U.S. at 503) and "is essential for the conduct of the public business" (*id.* at 507).[3]

Respondents' answer consists almost entirely of a number of policy reasons why the President should be subject to personal damages liability. However, many of these reasons are equally applicable to suits against legislators and judges, yet the Court has found them insufficient to deny an absolute immunity to those officials.

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[3] Respondent's argument (Halperin Br. 28) that a deliberate constitutional violation is "not within any official's line of duty because the [Constitution] is a restraint and a limitation on governmental action" misconceives the nature of absolute immunity for official acts. See *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959) (plurality opinion); *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). It is clearly within the President's "official" duties to authorize investigations to discover the source of damaging leaks of military and foreign policy information, even if in a particular instance the investigation is carried out in an improper manner.

Respondents have offered little to justify the conclusion that the head of the Executive Branch, in contrast to the constitutional officers of the Legislative and Judicial Branches, should be denied absolute immunity for his official actions.[4]

1. Respondents' principal contention (Halperin Br. 39, 43-44, 45) is that this Court's decision in *Butz* v. *Economou*, *supra*, rejects the arguments raised by petitioners and forecloses the issue of absolute presidential immunity. This is an incorrect reading of *Butz*. To the contrary, the Court expressly recognized that "there are some officials whose special functions require a full exemption from liability" (438 U.S. at 508) and that absolute immunity is appropriate where "need[ed] to protect the decisionmaking processes of an executive department" (*id.* at 503) and "essential for the conduct of the public business" (*id.* at 507). For the reasons fully set out in our opening brief (Pet. Br. 18-44), the "special functions" of the presidency, reinforced by principles of separation of powers, justify an absolute presidential immunity.[5]

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[4] Contrary to respondents' suggestion (Halperin Br. 19 n.12, 26-27 n.13), we have not conceded that absolute presidential immunity is inapplicable to respondents' claims under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Rather, as we pointed out in the petition (page 11 n.8) and in the reply memorandum at the petition stage (page 1), we have not sought review of the court of appeals' statutory ruling only because "even under the analysis of the court of appeals, no liability can be established under Title III." In addition, as we also noted in the reply memorandum (pages 1-2), if petitioners "are entitled to immunity from damages liability for decisions made in the exercise of the President's official responsibilities under Article II of the Constitution, that immunity could serve as a defense to statutory as well as constitutional causes of action." See also Memorandum for the Respondent at 4-6, *Zweibon* v. *Mitchell*, petition for cert. pending, No. 79-883 (filed Feb. 5, 1980).

[5] Indeed, respondents' discussion in this regard is most notable for the complete absence of any mention of the unique characteristics and responsibilities of the Office of the President.

In much the same vein, respondents argue (Halperin Br. 27, 30-31, 45), in line with the opinion of the court of appeals in this case (Pet. App. 36a), that absolute immunity is available only for officials making adjudicative and prosecutorial decisions "hemmed in by the public adversary system and the availability of appeal" (Halperin Br. 31). Once again, respondents' "overly simplistic approach" (*Imbler* v. *Pachtman*, 424 U.S. 409, 421 (1976)), reflects too narrow a reading of the applicable precedents. The Court has never held that absolute immunity is confined to participants in the adjudicatory process and, as noted above, the decision in *Butz* v. *Economou* recognized that Executive Branch officials in other contexts could be entitled to absolute immunity.[6] Moreover, as previously discussed (see Pet. Br. 21-24, 29-32), there exist adequate safeguards in the case of the President, wholly apart from personal damages actions, to channel the exercise of presidential authority.

Respondents object that these safeguards are inadequate because they failed to prevent the wiretap in this case (Halperin Br. 22, 45) and because they provide no compensation to persons aggrieved by the official misconduct (Halperin Br. 22, 28-29, 39-40). But the identical objections could be made to this Court's decisions recognizing absolute immunity for legislators, judges, and prosecutors. Likewise, respondents' observation that

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[6] We also note that judges are entitled to absolute immunity even where they act in a closed or ex parte proceeding or where appellate review is unavailable. See *Stump* v. *Sparkman*, 435 U.S. 349, 363 n.12 (1978). For example, if a federal magistrate had maliciously issued a warrant authorizing the Halperin wiretap and had ordered that respondents not be notified at the conclusion of the surveillance, there can be no doubt that absolute judicial immunity would be applicable. By the same token, a prosecutor is absolutely immune from damages liability for his decision to institute criminal charges (see *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 422), even though the harm suffered by an improperly indicted defendant cannot be remedied completely by a subsequent dismissal or acquittal.

"[f]or people in [their] shoes, it is damages or nothing" (Halperin Br. 40, quoting *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)) only states the consequence of upholding an absolute-immunity defense; it does not help to answer the relevant question of "how best to reconcile the [respondents'] right to compensation with the need to protect the decisionmaking processes of [the presidency]" (*Butz* v. *Economou*, *supra*, 438 U.S. at 503). Surely respondents are in no different position in this respect from the unsuccessful plaintiffs in, *e.g.*, *Stump* v. *Sparkman*, 435 U.S. 349 (1978), *Imbler* v. *Pachtman*, *supra*, and *Doe* v. *McMillan*, 412 U.S. 306 (1973).

Moreover, an absolute presidential immunity from personal damages liability does not elevate the President "above the law" (see, *e.g.*, Halperin Br. 21, 35-36, 50-51) but instead recognizes his accountability to the law—through impeachment, removal from office, congressional oversight, and criminal prosecution—in a way that also allows the uninhibited discharge of his constitutional responsibilities. Cf. *United States* v. *Nixon*, 418 U.S. 683, 715 (1974) (special rule for President does not "mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities * * * [and] to the performance of duties under that Article"). Indeed, it has never been thought that judicial officers, prosecuting attorneys, and legislators were placed "above the law" because of their absolute immunity.

Respondents also urge (Halperin Br. 21, 36) that an absolute presidential immunity is inconsistent with the Impeachment Clause of the Constitution, which provides (Art. I, Sec. 3):

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor,

> Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

However, as discussed in our opening brief (Pet. Br. 30) and as is evident from the authorities quoted by respondents (Halperin Br. 36), the concluding provision of the Clause is inapplicable to civil damages actions and establishes only that a criminal prosecution may follow a President's impeachment and conviction. Furthermore, the applicability of the Impeachment Clause to federal judges has not militated against recognition of an absolute judicial immunity, and no different conclusion should be drawn with regard to the President.

2. In an effort to show that the societal interests at stake here should be resolved in their favor, respondents argue that a qualified rather than an absolute immunity is sufficient to protect the legitimate operations of the presidency. In our opening brief (Pet. Br. 26-28, 32-37), we demonstrated at length that a qualified immunity would be seriously inadequate and would thereby "disserve the broader public interest * * * [in the] vigorous and fearless performance of the * * * [President's] duty * * *." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427.

These concerns are not answered by respondents' assurance that "a President will become personally involved in litigation only when it is clearly shown that he directly participated in violations of constitutional rights" (Halperin Br. 23; see also *id.* at 47-48). As Judge Learned Hand correctly recognized in *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), "if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried * * *." For much the same reason, respondents provide little security

by their assertion (Halperin Br. 65) that "the President's burden of establishing good faith usually will be minimal and can be overcome only by the strongest showing of impermissible motivation, intent to cause harm, or reckless disregard for the consequences of his action." As Judge Gesell observed (Pet. App. 52a), "[i]t is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision maker's mental processes are involved * * * [and] trial judges will almost automatically have to send such cases to full trials on the merits."

A President "inevitably makes many decisions that could engender colorable claims of constitutional deprivation" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 425), and rejection of absolute presidential immunity carries the likely danger of allowing numerous lawsuits by aggrieved citizens. Although respondents repeatedly proclaim (Halperin Br. 22, 26, 39, 41-42, 44-45) that this case may be confined to alleged violations of the Fourth Amendment, they have neither suggested any principled standard to justify such a limitation nor shown that this conditional protection, under which the President's immunity could be determined only after the fact in a judicial proceeding on the basis of the constitutional violation alleged, would adequately serve the compelling public policies that support the immunity.[7]

In the end, respondents' position fails because it does not preserve the presidency from the inhibiting effects

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[7] Respondents appear to confuse the doctrine of absolute immunity with other concepts such as justiciability and cause of action. The question of absolute immunity need not be considered if the case is non-justiciable or the complaint fails to state a cause of action. Thus, unless the issues raised "are appropriate for judicial consideration and do[] not enmesh the courts in reviewing presidential functions which may be outside the scope of judicial review" (Halperin Br. 39), the suit will be dismissed without reaching the absolute-immunity defense. See *Davis* v. *Passman,* 442 U.S. 228 (1979).

of potential damages liability for the President. Such a risk of personal liability would impair the fearless and decisive exercise of presidential authority, and "[t]he public trust [placed in the President] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages" (*Imbler* v. *Pachtman, supra*, 424 U.S. at 424-425). "[T]o submit * * * [the President] to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties" (*Gregoire* v. *Biddle, supra*, 177 F.2d at 581). And, notwithstanding respondents' assertion to the contrary (Halperin Br. 46), it is simply not the case "that the only actions which will be inhibited are those which violate clearly established individual constitutional rights." Rather, as respondents recognize (Halperin Br. 40), future Presidents will have to "think[] twice about this lawsuit" before carrying out their official functions. In light of the "grave, complex and unique responsibilities" of the presidency (Pet. App. 53a (Gesell, J., concurring)), "[t]he societal interest in providing * * * [the President] with the maximum ability to deal fearlessly and impartially with * * * [the duties of his Office]" (*Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)) warrants an absolute presidential immunity.[8]

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[8] Respondents argue (Halperin Br. 22, 42 n.18) that a President may be personally subject to injunctive relief and that "it is difficult to understand why [petitioners] resist judicial review of his conduct in the context of damage actions" (Halperin Br. 22). Whatever the availability of equitable relief directly against the President (compare, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 582-584 (1952)), there is a substantial difference between such a remedy and personal damages liability. As the Court has recently explained (citations omitted):

> [Absolute] immunity arose because it was in the public interest to have * * * [government officials] who were at liberty to exercise their independent judgment * * * without fear of be-

B. The Doctrine Of Derivative Immunity Is Applicable To Petitioners Kissinger, Mitchell, and Haldeman, Who, At The President's Direction, Undertook Acts That Would Be Subject To Absolute Immunity If Performed By The President Himself

In our opening brief (Pet. Br. 44-47), we showed that absolute presidential immunity should extend to those who act at the President's direction insofar as those acts, if performed by the President himself, would be protected by the immunity. See also *Dennis* v. *Sparks*, No. 79-1186 (Nov. 17, 1980), slip op. 5. Respondents do not dispute that President Nixon "authorized this entire program" (I J.A. 212) and that petitioners Kissinger, Mitchell, and Haldeman "were operating under [his] specific authority and were carrying out [his] express orders" (I J.A. 48-49). Compare Pet. Br. 44-45 with Halperin Br. 3, 13, 52. Instead, relying on decisions under the Speech or Debate Clause, they contend that "there is no legal basis for petitioners' derivative immunity argument" (Halperin Br. 24; see also *id.* at 53-54). Contrary to respondents' contention, the concept of derivative immunity applicable here is well established in the decisions of this Court and of the courts of appeals (see Pet. Br. 45-46).[9]

> ing mulcted for damages should an unsatisfied * * * [party] be able to convince another tribunal that the * * * [official] acted not only mistakenly but with malice and corruption. In terms of undermining * * * [an official's] independence and his * * * [governmental] performance, the concern that his conduct will be examined in * * * [an injunctive proceeding], a proceeding in which he cannot be held liable for damages * * *, is not of the same order of magnitude as the prospects of being a defendant in a damage action from complaint to verdict with the attendant possibility of being held liable for damages if the factfinder mistakenly upholds the charge of malice or of a corrupt * * * [violation of law].

Dennis v. *Sparks*, No. 79-1186 (Nov. 17, 1980), slip op. 7.

[9] Respondents also assert in passing (Halperin Br. 23) that we have conceded, under *Butz* v. *Economou*, that petitioners Kissinger,

The principal authority cited by respondents in support of their position is *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). In that case, the sergeant-at-arms of the House of Representatives executed an order of the House to arrest and imprison Kilbourn for contempt of Congress. Thereafter, Kilbourn commenced an action for false imprisonment against the sergeant-at-arms and several members of the House who had caused the order of arrest to be issued. Finding that the contempt proceedings exceeded the authority of the House and that Kilbourn's arrest and imprisonment were therefore unlawful, this Court held that the sergeant-at-arms was subject to liability but that the members of Congress were absolutely immune under the Speech or Debate Clause.

Kilbourn is fully consistent with petitioners' analysis of derivative immunity. In *Kilbourn*, the congressional de-

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Mitchell, and Haldeman are entitled to only a qualified independent immunity. This is incorrect. We expressly noted in our opening brief (Pet. Br. 50 n.44) that, "[a]part from the immunities derived from relations with the President, high-ranking government officials in certain circumstances may also be entitled to an independent absolute immunity based on the 'special functions' of their positions (*Butz* v. *Economou, supra*, 438 U.S. at 508)." However, we advised the Court (*ibid.*) that, "in light of the close nexus between presidential directives and the particular conduct at issue here, the Court need not reach any question of independent immunity in this case." We also observed (*ibid.*) that "the Court's resolution of the presidential immunity issue will serve to clarify the application of *Butz*" and thereby elucidate the proper analysis of petitioners' independent immunity under the *Butz* standard.

In view of these considerations, we have not further pressed the issue of petitioners' independent immunity in this case. Likewise, amicus Zweibon's arguments concerning the independent immunity of the Attorney General (Zweibon Am. Br. 10-20) are irrelevant here, because the Attorney General acted both at the direction of and in concert with the President in connection with the Halperin wiretap, and therefore they will not be addressed. The independent immunity of the Attorney General is presented in other pending cases (see *Mitchell* v. *Zweibon*, No. 79-881 (filed Dec. 7, 1979), and *Mitchell* v. *Forsyth*, No. 79-1120 (filed Jan. 18, 1980)), and should be briefed and decided in those cases.

fendants were found to be absolutely immune for official legislative actions taken in the House of Representatives. Unlike the sergeant-at-arms, "they did not in any manner assist in the arrest of Kilbourn or his imprisonment * * *" (103 U.S. at 200); since "these defendants did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him" (*ibid.*), the only basis for recovery against them was their legislative activity that the Court held was protected by the Speech or Debate Clause. The Court did not suggest that the members of Congress would have been immune if they had personally effected Kilbourn's arrest; rather, it held merely that the sergeant-at-arms had no immunity for conduct that would have been outside the scope of the Speech or Debate Clause if engaged in by a congressman. Cf. *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979).

This reading of *Kilbourn* is confirmed by subsequent decisions of this Court. In *Gravel* v. *United States*, 408 U.S. 606, 618, 620, 621, 622 (1972), the Court explained *Kilbourn* and the other decisions relied on by respondents in the following terms (emphasis added):

> *We * * * hold*[] *that the Speech or Debate Clause applies not only to a Member* [*of Congress*] *but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.*
>
> Nor can we agree * * * that our conclusion is foreclosed by *Kilbourn* v. *Thompson, supra, Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), and *Powell* v. *McCormack*, 395 U.S. 486 (1969), where the speech or debate privilege was held unavailable to certain House and committee employees. Those cases do not hold that persons other than Members of Congress are beyond the protection of the Clause when they perform or aid in the performance of legislative acts.
>
> * * * * *
>
> None of these three cases adopted the simple proposition that immunity was unavailable to con-

gressional or committee employees because they were not Representatives or Senators; rather, *immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection.*

* * * * *

None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In *Kilbourn-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution.* So, too, in *Eastland*, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, *no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest*, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no[t] * * * essential to legislating * * *.

* * * * *

[*T*]*he privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself.*

See also *Butz* v. *Economou, supra*, 438 U.S. at 496 n.23; *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 507, 508 (1975); *Doe* v. *McMillan, supra*, 412 U.S. at 312, 315-316, 320, 323.

In the instant case, unlike in *Kilbourn*, it is clear that President Nixon would have been absolutely immune, pursuant to the doctrine of presidential immunity, if he had personally undertaken the actions performed at his direction by petitioners Kissinger, Mitchell, and Haldeman. In such circumstances, these presidential advisors are entitled to derivative absolute immunity.[10]

---

[10] That petitioners Kissinger, Mitchell, and Haldeman exercised discretion in implementing the President's directives, as respond-

II. THE COURT BELOW ERRED IN REJECTING PETITIONERS' CLAIM OF QUALIFIED IMMUNITY AS A MATTER OF LAW AND IN IMPOSING RETROACTIVE DAMAGES LIABILITY ON PETITIONERS

In our opening brief, we demonstrated (Pet. Br. 50-62) that, because the law concerning national-security surveillance was unsettled at the time of the Halperin wiretap, petitioners are entitled to qualified immunity as a matter of law. We also showed (Pet. Br. 62-69) that the judicial decisions establishing constitutional standards for national-security surveillance, which were rendered after the Halperin wiretap had been terminated, should not be applied retroactively to create personal damages liability for petitioners. While these are distinct issues, respondents have raised identical objections to both claims, and we accordingly reply to their arguments in a consolidated fashion.

Respondents argue (Halperin Br. 24, 25-26, 54-57, 62-64) that the questions of qualified immunity as a matter of law and non-retroactivity cannot properly be resolved here because there is a factual dispute whether the Halperin wiretap was undertaken in good faith for legitimate national-security reasons. Contrary to this contention, we believe that the district court has already found that the primary purpose of the surveillance was the

---

ents point out (Halperin Br. 23, 51-53), does not defeat their claim to derivative immunity. In the many cases in this Court and the courts of appeals that recognize derivative immunity (see Pet. Br. 45-46 & 47 n.40), it was invariably true that the subordinate official utilized discretion and independent judgment in carrying out his superior's orders; yet in no case did that lead to the denial of derivative immunity. Indeed, because "it is literally impossible, in view of the complexities of the modern * * * [presidency], for * * * [the President] to perform * * * [his duties] without the help of aides and assistants * * * [,] the central role of * * * [absolute presidential immunity would] inevitably be diminished and frustrated" if derivative immunity were confined to instances of virtually ministerial action by the subordinate (*Gravel* v. *United States, supra*, 408 U.S. at 616-617).

protection of national-security information and that any further proceedings on remand would support that ruling (see pages 1-2, *supra*; Pet. Br. 10 n.16). We also believe that the district court did not hold that petitioners acted with subjective bad faith (see Pet. Br. 60-61), concluding instead that their "conduct cannot fairly be characterized as a wanton, reckless or malicious disregard of [respondents'] rights" (Pet. App. 56a). In our view, therefore, the record adequately presents the issues of qualified immunity and non-retroactivity.

However, even if the factual record is regarded as inadequate, we suggest that it would be appropriate for the Court to set forth the governing legal standards before remanding to the district court for further proceedings. In opposing the petition for a writ of certiorari in this case, respondents raised the same contentions concerning the state of the record. Nevertheless, the Court granted certiorari on the qualified immunity and retroactivity issues, and those legal issues have now been fully briefed. Moreover, by clarifying the scope of the inquiry on remand and reducing the prospect of further protracted litigation, this course best serves the public policies supporting the immunity and non-retroactivity doctrines applicable to public officials (see Pet. Br. 37-38 n.34, 51, 65, 67-69). In these circumstances, the Court should address the legal issues presented even if a remand for additional proceedings is necessary. Cf. *American Export Lines, Inc.* v. *Alvez*, No. 79-1 (May 12, 1980), slip op. 5.

On the merits, respondents argue (Halperin Br. 25, 55, 58-62) that qualified immunity as a matter of law and non-retroactivity are inappropriate here because Fourth Amendment principles in the area of national-security surveillance were "settled" (Halperin Br. 25) and "clearly established" (Halperin Br. 55, 62) at the time the Halperin wiretap was initiated in 1969. While respondents agree that the applicability of the warrant requirement was unresolved (see Halperin Br. 59), they

contend that the reasonableness standard "had been clearly spelled out prior to 1969" and was "applica[ble] * * * to national security wiretaps" (*ibid.*). However, from the vantage of hindsight, respondents have all too easily transferred the standards for criminal law enforcement wiretaps to the area of national-security surveillance as it existed in 1969. Respondents' argument entirely ignores the separate status of national-security wiretaps and the distinctive content of the reasonableness standard applicable to them. As demonstrated in our opening brief (Pet. Br. 52-59, 63-65), the Fourth Amendment standard in national-security cases was neither clearly established nor clearly foreshadowed in 1969.[11]

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1980

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[11] The uncertainty in the law is further illustrated by the discussion in amicus Zweibon's brief (pages 15-18) concerning internal Department of Justice consideration of national-security surveillance in light of this Court's decisions in *Alderman* v. *United States*, 394 U.S. 165 (1969), and related cases. Contrary to amicus Zweibon's contention, however, this discussion does not provide any evidence that petitioner Mitchell acted in bad faith. An Attorney General is neither bound by the advice rendered to him by Department officials nor required to adopt the most cautious interpretation of the law or the narrowest recommendation on departmental policy. Indeed, the very effort to probe into this decisionmaking process, and the corresponding need to examine high-ranking officials about their legal judgment reached a decade ago, persuasively demonstrate the importance of absolute immunity in this case (see Pet. Br. 32-37, 61).

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No. 79-880

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OCTOBER TERM, 1979

HENRY KISSINGER, *et al.*,

Petitioners,

—v.—

MORTON HALPERIN, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF HEDRICK AND ANN B. SMITH, individually and on behalf of their minor children, AMICI CURIAE

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INTEREST OF AMICI*

Amici Hedrick Smith, a Pulitzer-prize winning journalist working for the New York Times, his wife Ann and their three minor children, were victims of the same wiretap as that involved in the instant case; see *Smith* v. *Nixon,* 606 F.2d 1183 (D.C. Cir. 1979) *petition for cert. filed* 48 U.S.L.W. 3404 (U.S. Dec. 7, 1979) (No. 79-882). The defendants in both cases are almost identical—Nixon, Mitchell, Kissinger, Haldeman, Ehrlichman and Sullivan were sued in both cases for almost precisely the same acts.[1] Like

* Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

1 Haig was named as a defendant only in *Halperin* and de Loach was named only in *Smith.*

the Halperin family, the Smith's home private telephone was wiretapped for a considerable period of time despite the lack of any judicial warrant. Like the Halperin wiretap, the national security justification was extremely doubtful and the extent of the surveillance and the lack of probable cause or minimization made the tap presumptively unreasonable under the Fourth Amendment.

In addition, Mr. Smith was a working journalist and his selection as a target was even more questionable than that of a government employee since the effect of such a wiretap would be to implicate confidential source relationships.

In May 1976, the Smith family brought an action under 18 U.S.C. § 2520 and the Fourth Amendment. Before any discovery was permitted, the district court dismissed the action on the ground, *inter alia,* that the wiretap was not unlawful because the Justice Department had not violated its own regulations in installing the wiretap, *Smith* v. *Nixon,* 449 F.Supp. 324 (D.D.C. 1978). The Court of Appeals reversed, holding that it was not established that the wiretap was a valid national security operation, noting that "Smith did not satisfy the three criteria established by the Nixon Administration for identifying surveillance subjects." 606 F.2d at 1188. It also wrote that "courts may not simply accept bland assurances by the Executive that a situation did, in fact, represent a national security problem requiring surveillance." *Ibid.* It ordered a remand to the district court for discovery and a trial on whether valid national security considerations were in fact involved and whether the Fourth Amendment reasonableness requirements were met.

A petition for certiorari was filed in *Nixon* v. *Smith* simultaneously with that in the present action. This Court has acted only on the *Kissinger* petition and has not taken any action in *Nixon* v. *Smith.* The identical legal questions have been presented to this Court for review in both cases. Under those circumstances, it is obvious that this Court's determination of those issues in *Kissinger* will be crucial for the determination of the *Nixon* appeal. Thus if this Court accepts the government's arguments that the defendants in the *Kissinger* case are entitled to qualified

immunity as a matter of law, that holding would seriously affect the position of the Smith respondents as well. Therefore, the Smiths are vitally interested in presenting their point of view on the legal issues now before the Court and submit this amicus brief accordingly.

STATEMENT OF THE CASE

The petitioners seek to characterize the wiretap program at issue here as a pure and unblemished national security investigation. It describes the motivation of the participants as a concern "about unauthorized disclosures to the press of certain foreign policy documents and classified information." (Petitioner's Brief at 1).

Because of these leaks, petitioners claim President Nixon, Mitchell and Kissinger and former FBI director, J. Edgar Hoover met in April, 1969 to discuss breaches of security. After director Hoover had told everyone that wiretaps had been used previously in national security investigations, President Nixon authorized the program and established certain criteria for selecting targets. These criteria included (a) access to the information; (b) unfavorable information in the individual's security file; and (c) FBI investigations that listed the individual as a potential source of information. (I J.A. 326)

Following what was considered a major leak of information on the bombing of Cambodia, a wiretap was installed on Morton Halperin and three other individuals. Over the next two years, following other alleged leaks, the program was extended to a total of 17 persons, 4 of whom, including Hedrick Smith, were working journalists. The wiretaps were installed for different periods on different individuals, but the one on Morton Halperin remained for the full period of May 9, 1969 to February 10, 1971, even though he had left the National Security Council in September 1969 and resigned as a consultant in May 1970. The petitioners justify the 21 month wiretap in the following way: "Because the continuing surveillance failed to reveal that Halperin was the source of the leak, the wiretap was removed from the phone on February 10, 1976." Petitioners Brief at 6.

Although the petitioners urge that a legitimate national security wiretap was in operation, that position was rejected by the courts below and by independent inquiries conducted by Congress. Three separate Congressional committees investigated the wiretap program.[2] The Senate Foreign Relations Committee Study focused only on Dr. Kissinger's role and explicitly avoided making a judgment on the program as a whole.[3] However, the other two Congressional studies rejected the "bland assurances" of the petitioners—repeated here once again—that only national security considerations were behind the instigation and conduct of the wiretap program.

Thus the Church Committee Final Report described the scope of the program:

> On May 12, a formal request was sent by the Director to Attorney General Mitchell for wiretaps on all four individuals (one of which had been in operation for three days); Mitchell approved; and the additional taps were subsequently instituted.
>
> Over the course of the next one and one-half years, thirteen more individuals became the subjects of wiretaps in this same program. Bureau documents reflects the following authorizations from Attorney General Mitchell:
>
> —May 20, 1969: Two members of the staff of the National Security Council
>
> —May 29, 1969: A reporter for the *London Sunday Times*

---

2 See *Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities,* S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) (Church Committee); *Dr. Kissinger's Role in the Wiretapping of Certain Government Officials and Newsmen: Hearings Before the Senate Comm. on Foreign Relations,* 93rd Cong., 2d Sess. (1974); *Statement of Information, Committee on the Judiciary of the House of Representatives,* 93rd Cong., 2d Sess. (1974); H.R. Rep. No. 93-1305, 93rd Cong., 2d Sess. 146-150 (1974) (Judiciary Committee report on evidence from impeachment inquiry into wiretap program) ("House Impeachment Report").

3 See *Dr. Kissinger's Role in Wiretapping,* viii.

—June 4, 1969: A reporter for the *New York Times*

—July 23, 1969: A White House domestic affairs adviser

—August 4, 1969: A White House speech writer

—September 10, 1969: A correspondent for CBS News

—May 4, 1970: A Deputy Assistant Secretary of State; a State Department official of "Ambassador" rank; and a Brigadier General with the Defense Department

—May 13, 1970: Two additional staff members of the National Security Council

—December 14, 1970: A second White House domestic affairs adviser.

The longest of these wiretaps was the one on Halperin: it continued for twenty-one months, until February 10, 1971, and was apparently terminated at the insistence of Director Hoover, who was about to testify before the House Appropriations Committee. Other wiretaps lasted for periods of time varying from six weeks to twenty months.

"Warrantless FBI Electronic Surveillance," Supplementary Detailed Staff Reports of Intelligence Activities and the Rights of Americans, Church Committee, Final Report, Book III, 326.

The Church Committee Final Report made the following judgment about the program:

The "17" Wiretaps. The relative ease with which high administration officials could select improper intelligence targets was demonstrated by the "17" wiretaps on Executive officials and newsmen installed between 1969-1971 under the rationale of determining the source of leaks of sensitive information. In three cases no national security claim was even advanced. While national security issues were at least arguably involved in the initiation of the other taps, the program continued in two instances against persons who left the government and took positions as advisors to

Senator Edmund Muskie, then the leading Democratic Presidential prospect.

The records of these wiretaps were kept separate from the FBI's regular electronic surveillance files; their duration in many cases went beyond the period then required for re-authorization by the Attorney General; and in some cases the Attorney General did not authorize the tap until after it had begun. In 1971, the records were removed from the FBI's possession and sent to the White House.

Final Report, Book II, 122

The Church Committee based this conclusion on the wide scope of the program, the lack of proper standards and evidence of political motivation for obtaining, and later misusing, the information generated by the wiretap:

(iv) The "17" Wiretaps.

The Nixon White House learned a substantial amount of purely political intelligence from wiretaps to investigate "leaks" of classified information placed on three newsmen and fourteen executive officials during 1969-1971. The following illustrate the range of data supplied:

One of the targets "recently stated that he was to spend an hour with Senator Kennedy's Vietnam man, as Senator Kennedy is giving a speech on the 15th."

Another target said that Senator Fulbright postponed congressional hearings on Vietnam because he did not believe they would be popular at that time.

* * * * *

One of the targets told a friend it "is clear the Administration will win on the ABM by a two-vote margin. He said 'They've got [a Senator] and they've got [another Senator].'."

* * * * *

A friend of one of the targets described a Senator as "marginal" on the Cooper-Church Amendment and

> stated that another Senator might be persuaded to support it.
>
> * * * * *
>
> There is at least one clear example of the political use of such information. After the FBI Director informed the White House that former Secretary of Defense Clark Clifford planned to write a magazine article criticizing President Nixon's Vietnam policy, White House aide Jeb Stuart Magruder advised John Ehrlichman and H. R. Haldeman that "we are in a position to counteract this article in any number of ways." It is also significant that, after May 1970, the FBI Director's letters summarizing the results of the wiretaps were no longer sent to Henry Kissinger, the President's national security advisor, but to the President's political advisor, H. R. Haldeman.
>
> *Ibid.* at 235-37

The Church Committee Final Report emphasized the sweeping nature of the program:

> The so-called "seventeen" wiretaps on journalists and government employees, which collectively lasted from May 1969 to February 1971, also illustrate the intrusiveness of electronic surveillance. According to former President Nixon, these taps produced "just gobs of material: gossip and bull." FBI summaries of information obtained from the wiretaps and disseminated to the White House, suggest that the former President's private evaluation of them was correct. This wiretapping program did not reveal the source of any leaks of classified data, which was its ostensible purpose, but it did generate a wealth of information about the personal lives of the targets—their social contacts, their vacation plans, their employment satisfactions and dissatisfaction, their marital problems, their drinking habits, and even their sex lives.
>
> Among those who were incidentally overheard on one of these wiretaps was a currently sitting Associate Justice of the Supreme Court of the United States, who made plans to review a manuscript written by one of the targets. Vast

amounts of political information were also obtained from these wiretaps.

The "seventeen" wiretaps also exemplify the particularly acute problems of wiretapping when the targeted individuals are involved in the domestic political process. These wiretaps produced vast amounts of purely political information, much of which was obtained from the home telephones of two consultants to Senator Edmund Muskie and other Democratic politicians.

Ibid. at 200

The House Judiciary Committee in its impeachment report made similar judgments about the program. The Committee voted explicitly to recommend impeachment of President Nixon because of his involvement in the program:

ARTICLE II

Using the powers of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.

This conduct has included one or more of the following:

* * * * *

(2) He misused the Federal Bureau of Investigation, the Secret Service, and other executive personnel, in violation or disregard of the constitutional rights of citizens, by directing or authorizing such agencies or personnel to conduct or continue electronic surveillance or other investigations for purposes unrelated to national

> security, the enforcement of laws, or any other lawful function of his office; he did direct, authorize, or permit the use of information obtained thereby for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; and he did direct the concealment of certain records made by the Federal Bureau of Investigation of electronic surveillance.
>
> House Impeachment Report, 3

The House Judiciary Committee's judgment on the program was almost precisely the same as that of the Church committee. It described the scope of the program in the following words:

> One of the five NSC employees whose telephones were tapped was Morton Halperin (designated "N" in the Committee's statement of information). The wiretap of Halperin's telephone was installed on May 9, 1969. (Memorandum from Director, FBI to Attorney General, June 24, 1974; letter from Deputy Attorney General Silberman to Senator J. W. Fulbright, June 18, 1974) On July 8, 1969, Assistant FBI Director William Sullivan, who had day-to-day responsibility for the wiretaps, reported to Hoover that "nothing" of significance from the standpoint of the leak in question "has come to light" from the Halperin tap. Sullivan told Hoover that he had suggested Colonel Haig that some of this coverage be removed. (Book VII, 326) The Halperin wiretap, however, remained in place.
>
> *Ibid.* at 146-147

It concluded as to President Nixon's role:

> Evidence before the Committee shows, . . . that some of the taps were not legal, that they did not concern national security, but that they were installed for political purposes, in the President's interest and on his behalf. The President also privately admitted that the taps were very unproductive and were useless in determining the source of leaks.
>
> *Ibid.* at 150

The Judiciary Committee also concluded that those responsible for the program behaved as if they knew they were acting improperly because of the manner in which the records of the program were maintained:

> CONCEALMENT OF RECORDS OF THE 1969-1971 FBI WIRETAPS
>
> In conducting wiretaps, the FBI maintains a central file and indices of records of the taps so that the names of persons overheard are retrievable if production should be required during a criminal prosecution. The FBI was expressly ordered by Haig not to maintain records of the wiretaps initiated under the President's 1969 authorization, and was told that it would be desirable to have the matter handled without going to the Department of Justice. (Book VII, 189) The FBI nevertheless maintained unindexed logs and records of these taps and kept them in the office of Assistant Director William Sullivan. (Book VII, 182-83, 186)
>
> *Ibid.* 152-153

Eventually William C. Sullivan told Robert Mardian, Assistant Attorney General in charge of the Internal Security Division that he had the records in his possession.

> Mardian sought advice from Attorney General Mitchell and then, on July 11, 1971, was contacted by either Haldeman or Ehrlichman, who instructed him to fly to San Clemente to discuss the matter with the President. (Book VII, 758, 767) John Ehrlichman's notes of a July 10 meeting with the President include: "Re: Grand Jury—Don't worry re taps on discover—re WHs." Mardian arrived in San Clemente on July 11, 1971, and met with the President and Ehrlichman the next day. (Book VII, 806) The President directed Mardian to obtain the logs and files from Sullivan, to deliver them to the White House, and check with Kissinger, Haig and Haldeman to make sure all reports sent to them were accounted for.
>
> *Ibid.* at 153

Thus, two Congressional committees which investigated the program in detail judged that it was far from the properly initiated and carefully conducted national security program which the petitioners now urge on the Court. This was true because those responsible for creating and operating the program as a whole

1 selected as targets individuals such as Smith who could not possibly have been responsible for the leaking of national security information;

2 selected as target individuals such as Smith who did not meet the criteria established by President Nixon for inclusion in the program;

3 continued the wiretap on persons long after they left the government and were not in a position to obtain any national security information;

4 made no effort to minimize or screen out information obtained from the wiretaps unrelated to national security;

5 affirmatively sought out and passed on personal and political information about the targets to the White House;

6 violated the Justice Department's own regulations on national security wiretaps by (a) installing some without any written approval by the Attorney General; (b) not presenting reasons to the Attorney General to justify the wiretaps; (c) not putting any time limitations on the wiretaps; (d) not obtaining additional written authorization from the Attorney General for wiretaps that extended over 90 days; (e) not preserving the tapes of the wiretaps;

7 continued the program despite complaints by the FBI officials conducting it that it was fruitless;

8 did not maintain the records of the wiretaps in the regular FBI files and later secreted them in the White House after telling Director Hoover that they had been destroyed.

But even if the program as a whole began as a valid national security operation, that would still not resolve the claims of individual victims that they should not have been selected as targets and that the program was conducted unreasonably as to them. When one examines the individual wiretap on Halperin, the "bland assurances" of the government that national security was involved cannot be justified. As more fully explained in the Respondent's Brief,

1 the motivation for the wiretaps on Halperin appeared to be grounded in political complaints of leading Republican legislators that Halperin was a hold-over Democrat of questionable *political* loyalty. (see I J.A. 167-169)

2 Halperin did not have access to the key information on the Cambodian bombing published on May 9, 1969; (see I J.A. 214)

3 his access to other national security information was curtailed because he was suspected as a leaker; (I J.A. 214-216; II J.A. 229)

4 Halperin was considered a "prime suspect," by Hoover—who knew little if anything about access to the information involved—because he was an "arrogant Harvard-type Kennedy" man. (I J.A. 174)

5 the FBI recommended that the Halperin tap be taken off since it was not productive, but it was maintained for the full period of 21 months (I J.A. 184)

6 Halperin left the employ of the NSC on September 19, 1969 and became a consultant until May 1970 when he resigned; he had no access to classified information during this period and worked only one day for the NSC (I J.A. 216);

7 After May 1970 Halperin had no relationship of any kind with the NSC but the tap was maintained for an additional nine months;

8 Only 28% of the wiretaps overheard and logged by the FBI were between Halperin and persons outside the

family; on the other hand 27% were between Halperin and his wife. (606 F.2d at 1198, n.33)

9 The FBI passed on considerable political information, such as "planned publication criticizing the nation's Vietnam policy and congressional lobbying on war-related legislation, and political campaign plans, including potential opposition to President Nixon in 1972." 606 F.2d at 1198.

Based on these facts, the wiretap on Halperin takes on a totally different picture than that presented by the government.

INTRODUCTION AND SUMMARY OF ARGUMENT

This amicus brief is primarily directed to the second and third questions presented by the government, namely: (2) whether "[the petitioners] are entitled to a qualified immunity as a matter of law for authorizing electronic surveillance prior to this Court's decision in *United States* v. *United States District Court* (Keith), 407 U.S. 297 (1972)," and (3) "whether [that decision] . . . should be applied retroactively to create personal damage liability for federal officers."

It is the position of amici that the answer to the second question is no and that the third question has no meaning in this case. The *Keith* case established that a warrantless wiretap in domestic national security cases violated the Fourth Amendment. The alleged "uncertain state of the law" with respect to judicial warrants in national security cases becomes irrelevant when the challenged wiretap was not a true national security surveillance. Nor does the issue of a warrant become important when many other requirements of the Fourth Amendment have been violated.

The petitioners cannot show that they acted in subjective good faith as a matter of law. The undisputed record below shows that the wiretap was conducted for purposes unrelated to its original justification. The use of the wiretap for political reasons undercuts any possible claim of subjective good faith.

In addition, the objective part of the good faith test has not been proved by the petitioners. Regardless of the need for a warrant the wiretap at issue here violated the "reasonableness" requirement of the Fourth Amendment. There was no probable cause shown for the initiation for the wiretap, it was not limited in scope or in time, nor was it reviewed periodically to insure compliance with the original justification.

In addition, the wiretap violated important and well established First Amendment rights of the respondents. The petitioners intercepted private political conversations and used and disclosed the private political associational activities discovered by them through the wiretap. This governmental intrusion violated the First Amendment. *Shelton* v. *Tucker,* 364 U.S. 479, 485-86 (1960); *Bates* v. *Little Rock,* 361 U.S. 516 (1960).

Furthermore, the wiretap was installed on working journalists. This had the effect of the government intruding into and discovering all of the journalists' confidential sources. Such an intrusion without any showing of a compelling governmental need is a serious invasion of the journalists' First Amendment rights. See *Branzburg* v. *Hayes,* 408 U.S. 665 (1972).

ARGUMENT

THE PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW SINCE THE NATIONAL SECURITY JUSTIFICATION URGED BY THEM HAS NO BASIS IN THE RECORD

The petitioners argument on qualified immunity is based on a leaky syllogism. The steps of the argument are as follows:

1. The *Keith* case established that warrantless wiretaps were illegal in domestic national cases.
2. The state of the law before that time was uncertain with respect to warrantless domestic national security wiretaps.
3. The petitioners are therefore entitled to qualified immunity under *Wood* v. *Strickland,* 420 U.S. 308 (1972) and

Butz v. *Economou,* 438 U.S. 478 (1978) since the right to be free of a warrantless wiretap in such instances was not clearly established before the *Keith* case.

The key fallacy in the argument is the assumption that a true national security wiretap was at issue here. If the wiretaps were conducted in bad faith for purposes of political espionage, the date of the *Keith* case has no legal significance. There surely was no "uncertain state of the law" on the legality of using a warrantless wiretap to spy on political opponents or to wiretap journalists whose writing displeased the administration.

Furthermore the *Keith* case dealt only with the need for a *warrant.* It added nothing to the existing Fourth Amendment law on the need for probable cause, particularity of the description of the thing to be seized, limited surveillance in terms of scope and time and the need for periodic review. See *Katz* v. *United States,* 389 U.S. 347 (1967) and *Berger* v. *New York,* 388 U.S. 41 (1967). Thus on either subjective or objective grounds, the petitioners' good faith defense cannot be established as a matter of law.

A. The Good Faith Defense Cannot be Established as a Matter of Law

1. Subjective Good Faith

The petitioners cite this Court's decisions in *Wood* v. *Strickland, supra,* and *Butz* v. *Economou, supra* for the proposition that "in the absence of some showing of malice, an official would not be held liable in damages . . . unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation." 438 U.S. at 498. *See also, Procunier* v. *Navarette,* 434 U.S. 555 (1978); *Baker* v. *McCollan,* 443 U.S. 137 (1979).

The good faith defense thus has both a subjective and an objective component. The official must "be acting sincerely and with a belief that he is doing right." *Wood* v. *Strickland,* 420 U.S. at 321. He must not be acting "with malicious intention to cause a deprivation of constitutional rights or other injury." *Ibid.* at 322. If he does act in subjective bad faith, he will be held liable no

matter how uncertain the state of the law was at the time. This is the result of the decision in *Procunier* v. *Navarette,* 434 U.S. 555 (1978) where this Court examined both the state of the law with respect to prisoner mail at the time the acts at issue occurred, and second, the alleged state of mind of the government officials sued. If the unsettled state of the law was sufficient to establish a good faith defense it would not have been necessary to examine state of mind as well. Thus both parts of the test must be met by the defendant officials—who have the burden of proof on that score, see *Gomez* v. *Toledo,* 100 S.Ct. 1920 (1980).

In the instant case, the petitioners have not established either part of the defense. The district court specifically found that three of them—Nixon, Mitchell and Haldeman—had acted in subjective bad faith:

> From this factual base, the liability and responsibility of certain defendants emerges: former President Nixon, for having initiated and overseen the program without any temporal or informational limits on the surveillance; Attorney General Mitchell, for having failed to carry out review and renewal obligations during the entire twenty-one month surveillance period; H.R. Haldeman, for having reviewed the wiretap material for over a year without recommending termination and for having disseminated the material for purposes unrelated to the tap's original justification.
>
> . . . .
>
> As for any contention of subjective good faith, the undisputed record in this case controverts such a defense . . .
>
> 424 F. Supp. at 845.

That finding is fully supported by the numerous overreachings and excesses cited in the statement of the case and described so extensively by the Church Committee and the House Judiciary Committee. Since the petitioners have not shown and cannot show their subjective good faith as a matter of law—indeed the record is precisely the opposite—they cannot prevail on their good faith argument regardless of the state of the law at

the time they acted. The case must be remanded, as the Court of Appeals determined, for fuller hearings.[4]

The petitioners dispute the finding of subjective bad faith made by the District Court and referred to by the Court of Appeals. They argue that since the District Court did not award punitive damages it could not have found that the petitioners "acted in bad faith." (Petitioner's Brief at 60). In other words petitioners suggest that only a finding of sufficient malice to warrant an award of punitive damages can justify a finding of bad faith. That is simply not the law. As this Court noted in *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975), a *"compensatory award* will be appropriate only if the school board member has acted with such an impermissible motivation . . . that his action cannot reasonably be characterized as being in good faith." (emphasis added).

The petitioners have noted that there is a difference between a finding of malice for the purpose of awarding punitive damages and a finding of subjective bad faith. In footnote 59 of their brief (at p. 60) they admit that "the standards of malicious intent for punitive damages and for qualified immunity are not necessarily identical." Nevertheless they argue that it is "unlikely" that the district court would have denied punitive damages if it had found that "petitioners acted in bad faith and with a malicious intent." But this argument is simply a reassertion of the argument that "malice", "bad faith" and "lack of subjective good faith" are equivalent concepts. They are not, as the District Court explicitly found in this case.

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4 In this regard the Smith amici are in a slightly different position than the Halperin respondents. There was no determination in the Smith case of either the absence or presence of subjective bad faith. Since the Smith case was originally disposed of on a motion to dismiss, there was no discovery, no factual submissions on this point, not even an answer. There were however allegations of bad faith in the complaint which was fully supported by the detailed studies made by the Congressional committees cited above. Since Hedrick Smith was a working journalist when his home telephone was wiretapped, the lack of any subjective good faith becomes an even more compelling conclusion, as explained below. In any event, a finding of subjective good faith as a matter of law based on the *Smith* record is simply impossible at this stage of the proceedings.

2. Objective Good Faith

Even if the subjective part of the test is met, the official's belief in the legality of what he is doing must be reasonable. This objective part of the test focuses not on the individual actor's own motivation, but on the state of the law at the time. See generally L. Friedman, "The Good Faith Defense in Constitutional Litigation," 5 *Hofstra L. Rev.* 501 (1977).

The objective good faith defense cannot be established as a matter of law on this record. As noted above the petitioner's entire argument is premised on the assumption that a legitimate national security wiretap was installed and in operation and that the state of the law on such wiretaps was unclear until the *Keith* case had been decided in 1972. However, the factual record in this regard does not support the position that such a legitimate wiretap was involved. The Court of Appeals specifically remanded this case and *Smith* v. *Nixon* for further factual development on this score. It required the parties to present evidence on their contention that national security considerations were or were not the "primary purpose" of the wiretap: "On remand the District Court must address all of these contentions. Title III will apply to any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities. Where the parties have posed genuine issues of material fact, the court will have to undertake an evidentiary inquiry."[5] 606 F.2d at 1205.

Rather than undertake such a test of their assertions, petitioners argue here that whatever they say is national security is national security and that the courts are bound by that assertion. This Court has never accepted such "bland assurances" previously, nor should it do so now. See *Keith, supra.*

In addition, the "state of the law" on the Fourth Amendment reasonableness requirements—as opposed to the need for a

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5 In *Nixon v. Smith, supra,* there was no discovery or evidentiary development of any of the underlying facts as to the wiretap on Hedrick Smith and his family. Thus full evidentiary hearings would be necessary.

warrant—was perfectly clear in 1969. In *Berger* v. *New York*, 388 U.S. 41 (1967), this Court, in holding a New York wiretap statute unconstitutional, emphasized the importance of the particularization requirements of the Fourth Amendment because "[b]y its very nature eavesdropping involves an intrusion on privacy that is broad in scope." *Id.* at 56. This Court went on to spell out the procedures necessary to permit a wiretap to meet Fourth Amendment standards:

a The surveillance must be based on probable cause and must specify with particularity the communciations to be seized. *Id.* at 59.

b The surveillance must be limited in scope. It cannot permit the seizing of all communications of all persons using the telephone regardless of their relation to the purpose of the surveillance. *Id.*

c The surveillance must be limited in time. "[A]uthorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause." *Id.*

d There must be periodic renewals based on a new showing of probable cause. *Id.*

This Court in *Katz v. United States,* 389 U.S. 347 (1967) further held that wiretaps are covered by the Fourth Amendment. After noting that the Fourth Amendment protects "people—and not simply 'areas'," the Court declared that:

> "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353.

It specifically held that a warrant must be obtained before such a "search and seizure" occurs. At the end of its opinion this Court for the first time suggested that the Fourth Amendment

might be applied somewhat differently "in a situation involving the national security." *Cf. United States* v. *Abel,* 362 U.S. 217 (1960). However, it reserved judgment only on the question of whether a warrant from a magistrate was necessary,[6] indicating that the safeguards required by the Fourth Amendment other than the warrant were fully applicable to national security cases.

Furthermore, this exception, if it existed, was quite limited in nature. Mr. Justice White in his concurrence in *Katz* described the footnote as an "acknowledgment that there are circumstances in which it is reasonable to search without a warrant" and said such circumstances, in his view, included "national security cases." 389 U.S. at 363. Justices Douglas and Brennan, in attacking the suggestion that such an exception existed, proclaimed that "spies and sabotuers are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner." 389 U.S. at 360.

In *Alderman* v. *United States,* 394 U.S. 165 (1969) both Justice Fortas and Harlan thought there might be an exception to the rule there announced in national security cases but both recognized that the category involved would be limited to situations involving espionage or sabotage. See 394 U.S. at 199, 209.

Thus, it was "settled indisputable law" in May 1969 as determined by Supreme Court precedents that:

1. All wiretaps had to be conducted in accordance with the Fourth Amendment.

2. All wiretaps—even if justified on national security grounds—had to be "reasonable" to satisfy the Fourth Amendment.

3. Whether or not the "reasonableness" standard of the Fourth Amendment could be satisfied without a warrant, a wiretap had to comply with other precedural norms to avoid being an unconstitutional general search.

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6 The footnote reads: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented in this case." 389 U.S. at 359, n.23.

4. The only exception to the warrant requirement—if it existed—was in the investigation of "spies and saboteurs."

5. The standards required by the Fourth Amendment included: (a) probable cause; (b) limitations on duration; (c) periodic renewals; and (d) minimization to avoid seizing conversations beyond the purpose of the surveillance.

Thus, the Supreme Court precedents in the summer of 1969 nowhere suggested that national security wiretaps were legal if directed indiscriminately against government officials with no access to leaked information or against a working journalist who published that information. Furthermore, there is nothing in the *Keith* opinion that suggests that new law was being written in that case. The Supreme Court in *Keith* reaffirmed certain basic propositions of the Fourth Amendment clearly laid down in *Berger* and *Katz*.

Based on this standard and on this record, the petitioners cannot possibly show their good faith belief in the legality of what they were doing on the ground that the state of the law on reasonableness was unclear at the time. They selected targets on less than probable cause, indeed on less than founded suspicion. There was no jusitification offered as to either Halperin or Smith to justify their selection to victims. The tap stayed on Halperin for 21 months and on Smith for 89 days, long beyond the 60 days condemned in *Berger*. There was no effort to review the taps on a periodic basis. No effort on minimization was made, indeed the taps were utilized to obtain personal and political information totally unrelated to national security.

These actions by petitioners were unreasonable as a matter of law in 1969. At the least, the petitioners have not shown at this stage that they had a good faith belief in their legality and that such a belief was reasonable. Thus, apart from the warrant question, the petitioners cannot succeed on the "objective" part of the good faith defense. They cannot show that the state of the law on the Fourth Amendment reasonableness requirements was unclear at the time they acted.

B. The Petitioners' Conduct Violated Important and Well-Established First Amendment Rights

The Court of Appeals found that respondents' First Amendment rights were implicated by the wiretap on their home telephone. See 606 F.2d at 1199; see also *Smith* v. *Nixon,* 606 F.2d at 1189. This position is fully supported by this Court's decision in *Keith* where it said, "national security cases . . . often reflect a convergence of First Amendment values . . . though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech, ... *The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'* " 407 U.S. at 313-14. (emphasis added).

Thus the wiretap on the Halperin family which intercepted their private political conversations—including Morton Halperin's conversations relating to Senator Muskie's candidacy and to the Clark Clifford article—violated important First Amendment rights. Those conversations were intercepted by design and with the purpose and effect of discovering Halperin's political views, associations and activities, though privately expressed. Whether the interceptions are viewed as "unreasonable" under the Fourth Amendment because of their seizure of political views and associations or whether an independent First Amendment violation is stated, the result is the same: the actions by those government officials responsible constitute a constitutional tort under *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971).

The seizure of these political conversations has two important legal consequences: (1) it undermines the claim that the surveillance was an unblemished national security wiretap; (2) it shows that the participants could not have had a reasonable belief in the legality of what they were doing.

In 1969 this Court had already declared that governmental intrusion into private political views, expressions or associations violated the First Amendment. In *Shelton* v. *Tucker,* 364 U.S. 479, 485-86 (1960) this Court struck down an Arkansas law which

compelled a candidate for a teaching position to reveal all his or her organizational associations. "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." In *Bates* v. *Little Rock,* 361 U.S. 516 (1960) this Court invalidated an Arkansas ordinance that required all organizations to disclose the names of its members. In *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 462 (1958) this Court declared that "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's association. . . . Inviolability of privacy in group association may in many circumstances be indispensible to preservation of freedom of association, particularly where a group espouses dissident beliefs." Before the government can discover associational information of any person, it must show a "compelling and subordinating governmental interest," *Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539, 557 (1963).

In the face of these pronouncements, which were clearly established by the late 1960's, the petitioners intruded into the respondents political and associational ties in the most complete and overreaching manner. Furthermore, they did so surreptitiously without giving respondents a chance to protest or resist. They could not possibly have held a good faith belief in the legality of discovering, reporting on and using Morton Halperin's political views and associational ties. On this score alone, the petitioners' claim of qualified immunity must fail.

C. The Wiretap Program Was Illegal Because of the Surveillance of Working Journalists.

The petitioners assert both in this case and in *Nixon* v. *Smith* that the wiretap program was a proper national security surveillance and that they are entitled to qualified immunity as a matter of law because of their belief in the legality of what they were doing. They claim immunity from damages for wiretapping the journalists who allegedly printed the leaked information as well

as Halperin and the other governmental employees who were suspected of leaking it. According to their argument merely an assertion that national security was involved permitted them to install the wiretap on the journalists allegedly involved.

This is not the law now nor was it the law in 1969. It is obvious that the wiretapping of a journalist involves the most widespread and wholesale discovery of confidential sources. It is far more sweeping that a grand jury subpoena to a journalist to ask him the source of a particular story, *Branzburg* v. *Hayes,* 408 U.S. 665 (1972) or a search warrant of a newspaper office, *Zurcher* v. *Stanford Daily,* 436 U.S. 547 (1978) or subpoena of a journalist's telephone toll records. *Reporter's Committee for Freedom of the Press* v. *AT&T,* 593 F.2d 1030 (1978), cert. denied, 440 U.S. 949 (1979). As the Court of Appeals said in *Smith* v. *Nixon,* 606 F.2d at 1189, n. 34: "Compared to a review of billing records, the wiretapping program in this case is a much more intrusive invasion of any citizens rights and a greater restriction on a journalist's professional freedom."

Yet the importance of giving some protection to confidential sources has been recognized in each of these less intrusive situations. In *Branzburg,* it was stated that a grand jury subpoena did not require "the press to publish its sources of information or indiscriminately to disclose them on request." 408 U.S. at 682 (plurality opinion). This is precisely the effect of a wholesale wiretap. Justice Powell in his concurring opinion noted that a journalist would not have to implicate "confidential source relationships" if there is no "legitimate need of law enforcement." 408 U.S. at 710 (Powell, J., concurring). See also *Saxbe* v. *Washington Post,* 417 U.S. 843, 859 (1974): ". . . we recognized explicitly that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful." (Powell, J., dissenting). Justice Brennan has recently explained in *In re Roche,* 49 U.S.L.W. 3017 (July 23, 1980) (in chambers)

> "At the same time, there is support for the proposition that the First Amendment interposes a threshold barrier to the subpoena of confidential information and work product

> from a newsgatherer. Four dissenting Justices in Branzburg discerned at least some protection in the First Amendment gathering, 408 U.S., at 721 (Douglas, J., dissenting); 408 U.S. at 744-747 (Stewart, J., dissenting, joined by Brennan and Marshall, JJ.). And Mr. Justice Powell, who joined the Court in Branzburg, wrote separately to emphasize that requests for reporter's documents should be carefully weighed with due deference to the 'vital constitutional and societal interests' at stake. 408 U.S. at 710. Consequently, I do not believe that the Court has foreclosed news reporters from resisting a subpoena on First Amendment grounds.

The Justice Department has issued detailed regulations relating to the subpoena of reporters, 28 C.F.R. § 50.10, requiring federal law enforcement officers to make all reasonable attempts to obtain information from nonmedia sources, to negotiate with the media and to seek express authorization from the Attorney General before a subpoena is issued. In addition there must be reasonable grounds to believe that the media member has essential information.

As far as search warrants are concerned, this Court in *Zurcher* noted that

> a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment . . . when he weighs such factors. 436 U.S. at 520.

Congress has now passed legislation to protect journalists from direct use of a search warrant, except in certain situations, Privacy Protection Act of 1980, P.L. 96-440, (October 13, 1980). Even in the telephone records case, the Court of Appeals held that claims of bad faith use of a subpoena states a valid cause of action on behalf of the reporters involved, *Reporters Committee, supra,* 593 F.2d at 1064.

When a reporter is wiretapped directly none of these protections exist. Every one of his sources, and exactly what they say, is disclosed to the government. He has no opportunity to challenge the government's right to this information since he does not

know it is being taken. Such a surveillance is among the worst invasions or intrusions into a journalist's activities known to the law.

Furthermore, the government's justification for the intrusion here is far less than has been accepted in the other situations. As a general proposition, the wiretapping of a journalist's home telephone is not likely to discover the person who leaked a newsstory. The Church Committee Staff Report commented:

> The wiretapping of journalists in the investigation of leaks, however, has proven to be a fruitless enterprise. As former Secretary of State Dean Rusk stated:
>
> 'Tapping newsmen will not stop leaks and for the most part is not even going to uncover leaks. There are so many different ways in which leaks can be made and from so many different quarters that there is no way to get at the business of leaks and on sheer practical grounds this is rather foolish policy to pursue.'
>
> Aside from matters of practicality, the Constitution gives special protection to 'freedom of the press.' The precedent set by wiretapping newsmen inevitably leads to undermine the constitutional guarantee of a free and independent press.
>
> Book III, 340

The so-called foreign intelligence exception formerly found in 18 U.S.C. § 2511(3) cannot possibly be stretched to justify wiretaps on journalists simply because of a suspicion that information—classified or otherwise—was leaked to the press and published and thereby made available to a foreign power. In this context as well the government's "bland assurance" that national security was at stake cannot be accepted at face value.

At a minimum, the First Amendment requires that the specific justification for wiretapping a journalist be examined critically and in detail. In this case the petitioners claim that leaks occurred on strategic arms limitations talks, peace proposals for the

Middle East, the war in Vietnam and "the return of the island of Okinawa to Japanese control." (Petitioners Brief at 1). It is uncontradicted that Hedrick Smith had no involvement in any of the stories except for the Okinawa reversion. (See *Nixon* v. *Smith,* No. 79-892, Petition for Writ of Certiorari at 6). In this situation it cannot be said that the government is properly applying the national security concept. If a story about our negotiations with our Japanese ally over return of Okinawa justifies a three month wiretap on a working journalist on national security grounds, then that term has lost its meaning. See *United States* v. *Ehrlichman,* 376 F. Supp. 29 (D.D.C. 1974), aff'd 546 F.2d 910 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1120 (1977). The range of reporting to which the government tries to apply its theory would make scores of journalists writing on foreign or diplomatic affairs proper targets if they reported anything more than official government handouts. That is not what the First Amendment means. See *Houchins* v. *KQED, Inc.,* 438 U.S. 1, 13-14 (1978) (Burger, C.J.).

Furthermore, the law in 1969 recognized the journalist's right to protect his sources from unwarranted disclosure. At least as early as *Garland* v. *Torre,* 259 F.2d 545, 549 (2d Cir. 1958), it had been recognized that compulsory process could not be used "to force a wholesale disclosure of a newspaper's confidential sources of news." This is precisely what a wiretap of a journalist would produce. Justice (then Judge) Stewart indicated the relationship between the journalist privilege being asserted and the First Amendment right to resist disclosure of associational ties. He wrote:

> It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. Cf. National Ass'n for Advancement of Colored People v. State of Alabama ex rel. Patterson, 1958, 357 U.S. 449, 464-465, 78 S.Ct. 1163, 2 L.Ed. 2d 1488. The question asked of the appellant went to

> the heart of the plaintiff's claim. We hold that the Constitution conferred no right to refuse an answer.
>
> 259 F.2d at 549-550

See also *Baker* v. *F. & F. Investment,* 470 F.2d 228 (2d Cir. 1972); *Riley* v. *City of Chester,* 612 F.2d 708, 715 (3d Cir. 1979) ("journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources."); *United States* v. *Cuthbertson,* 6 Med. L. Rptr. 1545 (3d Cir. July 23, 1980).

Thus in 1969 petitioners should have known that they were violating established law against wholesale intrusion into journalists' confidential sources. By installing a wiretap for 89 days on Hedrick Smith, they engaged in the most sweeping invasion of his sources. They cannot now claim that they thought their acts were lawful.

Nor can they claim that there was an established practice of wiretapping newsmen upon which they relied. Whatever the background or history of the thirty years of national security wiretaps before 1969 they had not been used to any degree for the purpose of wholesale and sweeping wiretapping of journalists.[7]

Furthermore the Smiths have alleged that petitioners installed the wiretap in bad faith, a claim that must be accepted as true at this stage of the proceedings. *Walker Process Equip. Inc.* v. *Food Machinery and Chemical Corp.,* 382 U.S. 172, 174-75 (1965).

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7 The Church Committee (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities) reported two prior cases of working journalists being wiretapped for publishing classified information. One journalist was wiretapped for seven days in 1961 and another for 33 days in 1962. *See* Senate Select Comm. to Study Governmental Operations, *Supplementary Detailed Staff Reports of Intelligence Activities and the Rights of Americans—Final Report, Book III,* S. Rep. No. 94-755, 94th Cong., 2d Sess. at 323 ("Warrantless FBI Electronic Surveillance") (1976).

CONCLUSION

For the reasons stated above, *amici* respectfully requests that this court affirm the judgment of the Court of Appeals below.

Respectfully submitted,

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Supreme Court U.S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

No. 79-880

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HENRY KISSINGER, *et al.*,

Petitioners,

v.

MORTON HALPERIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
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THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF
BERTRAM ZWEIBON, MARILYN BETMAN, IRVING CALDERON, STUART C. COHEN, SHELDON DAVIS, JEROME EISENBERG, LAWRENCE H. FINE, EILEEN GARFINKLE, RUTH HARTSTEIN, LIBBY KAHANE, MEIR KAHANE, NEIL S. ROTHENBERG, MURRAY SCHNEIDER, ELI SCHWARTZ and ALEX STERNBERG, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The plaintiffs in *Zweibon v. Mitchell,* 606 F.2d 1172 (D.C. Cir. 1979), petitions for writs of certiorari pending (Nos. 79-881, 79-883), move this Court, pursuant to Rule 36 of the Rules of the Supreme Court, for leave to file the accompanying twenty-page brief *amicus curiae* in support of respondents. Respondents' written consent is

attached hereto (Attachment #1). Although petitioners' consent was requested (Attachment #2), no written response was received. Petitioners have indicated verbally that they would not consent to the filing of the brief.

Movants seek to file this brief because this Court's opinion in *Kissinger v. Halperin* may encompass two issues which are of singular importance to the resolution of *Zweibon*. The first relates to the petitioners' argument that the decision of the Court of Appeals for the District of Columbia Circuit in *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976), should be given prospective effect only. The accompanying brief urges this Court to make clear, if it should decide to give *Zweibon* prospective effect, that the individuals whose litigation produced the decision in *Zweibon* are entitled to benefit from it. None of the parties to the instant litigation are likely to brief this issue.

The second issue relates to the petitioners' argument that the President and his immediate subordinates are entitled to absolute immunity or "qualified immunity as a matter of law." The accompanying brief urges this Court to hold a cabinet officer who is not acting at the specific direction of the President to the qualified immunity defense of *Butz v. Economou*, 438 U.S. 478 (1978), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974), under which he must establish both (1) that he actually believed his conduct to be lawful, and (2) that such a belief was reasonable. While the issue of the scope of immunity available to cabinet officers apart from that which might be derivative of presidential immunity is clearly presented by, and may be necessary to the disposition of, *Kissinger v. Halperin* (because a presidential subordinate would have available to him at least the immunity that he would have had had he acted alone),

independent, as opposed to derivative, immunity will not be the focus of the parties' briefs because that case involves individuals acting at the specific direction of the President.

For eight years, the plaintiffs in *Zweibon* have been seeking compensation for the violation of their rights in 1970 and 1971. The manner in which this Court decides the issues before it in *Halperin* will determine, in large part, whether they can proceed to a determination on the merits.[1] For these reasons, the plaintiffs in *Zweibon* move this Court for leave to file the accompanying brief *amicus curiae.*

Respectfully submitted,

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---

[1] *Amici* have been represented below and in this Court by Nathan Lewin, Martin D. Minsker and Jamie S. Gorelick, who have participated in the preparation of this brief. They are members of a law firm which also represents former President Richard Nixon in connection with civil litigation and other matters unrelated to the electronic surveillances at issue in *Halperin.* While the issues before the Court in *Halperin* affect interests of the former President in these other matters (and have been discussed, in that context, by other attorneys in the firm with attorneys for the Department of Justice), the arguments presented in this *amicus* brief do not relate to, and would not affect, those interests.

[2] Admitted to practice before the Supreme Court as of November 3, 1980.

ATTACHMENT #1

MARK H. LYNCH
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October 28, 1980

Jamie S. Gorelick, Esquire
Miller, Cassidy, Larroca & Lewin
Suite 500
2555 M Street, N.W.
Washington, D.C. 20037

Re: *Kissinger v. Halperin*,
No. 79-880 (S. Ct.).

Dear Ms. Gorelick:

Respondents in the above-captioned case consent to the filing of a brief *amicus curiae* by the respondents in *Mitchell v. Zweibon*, No. 79-881 (S. Ct.).

Sincerely,

/s/ Mark H. Lynch
Mark H. Lynch

ML/skh

ATTACHMENT #2

ARONSTEIN AND ZWEIBON

Attorneys at Law
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Bertram Zweibon
Richard L. Aronstein

October 14, 1980

BY HAND

Mr. Wade H. McCree, Jr.
Solicitor General
United States Department of Justice
Tenth and Pennsylvania Avenue
Washington, D.C.

Re: *Kissinger v. Halperin, No. 79-880*

Dear Mr. McCree:

I am writing to request your consent to the filing of a brief *amicus curiae,* in support of respondents in the above-referenced case, by plaintiffs in *Zweibon v. Mitchell,* petitions for writ of certiorari pending, Nos. 79-881, 79-883. That case is being held pending the Court's decision in *Kissinger v. Halperin,* No. 79-880.

Two issues potentially raised by *Halperin,* but not likely to be the focus of the parties' briefs, are critical to the resolution of *Zweibon:* (1) whether the litigants whose action establishes a judicial ruling are entitled to the benefit of that ruling even if it is otherwise given prospective effect; and (2) whether an executive branch officer not acting in concert with or at the direction of

the President should be entitled only to a qualified immunity defense under which he would have to establish an actual and reasonable belief that his acts were lawful. I would like to file a brief *amicus curiae* which focuses on those issues. I request your consent to the filing of that brief.

I would appreciate a response by October 20, 1980.

Sincerely yours,

/s/ Bertram Zweibon
Bertram Zweibon

Supreme Court, U. S.
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***AMICI CURIAE*, IN SUPPORT OF RESPONDENTS**

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***AMICI CURIAE*, IN SUPPORT OF RESPONDENTS**

SUMMARY OF ARGUMENT

The case before the Court was argued and decided below with *Zweibon v. Mitchell*, 606 F.2d 1172 (D.C.Cir. 1979). Petitions for writs of certiorari in *Zweibon*, Nos. 79-881, 79-883, are being held pending a decision in this case. The plaintiffs in *Zweibon* are filing this brief

because this Court's decision in *Halperin* may encompass two issues which are of singular importance to the resolution of *Zweibon.*

A principal question before the Court in *Halperin* is whether the decision of the Court of Appeals for the District of Columbia Circuit in *Zweibon v. Mitchell,* 516 F.2d 594 (D.C.Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1976) ("*Zweibon I*"), is to be given retroactive or prospective effect. Whatever the Court may decide concerning the retroactivity of that decision to other cases, we urge the Court to make clear that the individuals whose litigation produced that decision are entitled to benefit from it.

Another major issue before the Court in *Halperin* is whether the President and his immediate subordinates are entitled to absolute immunity or "qualified immunity as a matter of law." Whatever this Court may decide with respect to that issue, a cabinet officer who is not acting at the specific direction of the President should be entitled only to the qualified immunity defense of *Butz v. Economou*, 438 U.S. 478 (1978), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974), under which he must establish both (1) that he actually believed his conduct to be lawful, and (2) that such a belief was reasonable.

INTEREST OF THE AMICI

This brief is submitted on behalf of individuals whose communications were overheard when they used the telephones at the offices of the Jewish Defense League during the month of October 1970 and between January 5 and July 3, 1971. John Mitchell, then Attorney General, personally directed the installation and operation of the warrantless wiretaps upon requests from the Director of the Federal Bureau of Investigation citing the

Jewish Defense League's record of public demonstration and violence against Soviet and Arab diplomats. Mr. Mitchell has never suggested that the then President knew of or authorized the wiretaps.

In 1972, after the wiretaps were disclosed, these individuals sued, alleging violations of the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"). The district court granted defendants'[1] motion for summary judgment on the ground that the wiretaps were "national security" surveillances which could lawfully be installed without a warrant. *Zweibon v. Mitchell*, 363 F.Supp. 936 (D.D.C. 1973). In a lengthy opinion, the court of appeals, which sat *en banc*, reversed. *Zweibon I*, 516 F.2d 594 (D.C.Cir. 1975).

On remand, plaintiffs' demand for a jury trial on the defendant's good faith defense was struck by the district court. Upon plaintiffs' petition for a writ of mandamus, the court of appeals remanded the case on the "assumption" that the district court would grant a jury trial. *In re Zweibon*, 565 F.2d 742 (D.C.Cir. 1977) ("*Zweibon II*"). Thereafter, the district court again granted summary judgment for the defendant, refusing to apply retroactively the constitutional requirement that a warrant be secured for these kinds of national security wiretaps—the rule established in *Zweibon I*. The district court also limited to prospective effect *Zweibon I's* holding that the procedures and remedies of Title III apply to national security surveillances which violate the Fourth Amend-

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[1] The original complaint named as defendants the FBI agents who participated in the wiretaps. The FBI agents have since been dropped as defendants.

ment. *Zweibon v. Mitchell*, 444 F.Supp. 1296 (D.D.C. 1978).

The court of appeals reversed, holding that the constitutional warrant requirement was not to be "restrict[ed] . . . to prospective effect in damage suits like this one." *Zweibon v. Mitchell*, 606 F.2d 1172, 1175 (D.C.Cir. 1979) ("*Zweibon III*"). It affirmed, however, the district court's ruling that the statutory remedy established by *Zweibon I* would only be available prospectively, concluding that that question had been one of first impression in *Zweibon I*. 606 F.2d at 1181-82.

For eight years, the plaintiffs in *Zweibon, amici* here, have been seeking compensation for the violation of their rights in 1970 and 1971. The manner in which the Court decides the issues before it in *Halperin* will determine, in large part, whether they can proceed to the merits or whether the important legal issues remaining in the case will have to be resolved in *Zweibon IV, Zweibon V* and *Zweibon VI.*[2]

---

[2] *Amici* have been represented by Nathan Lewin, Martin D. Minsker and Jamie S. Gorelick, who have participated in the preparation of this brief. They are members of a law firm which also represents former President Richard Nixon in connection with civil litigation and other matters unrelated to the electronic surveillances at issue in *Halperin*. While the issues before the Court in *Halperin* affect interests of the former President in these other matters (and have been discussed, in that context, by other attorneys in the firm with attorneys for the Department of Justice), the arguments presented in this *amicus* brief do not relate to, and would not affect, those interests.

I

THE PARTY WHOSE ACTION ESTABLISHES A RULE IS ENTITLED TO ITS BENEFIT, EVEN IF IT IS OTHERWISE GIVEN ONLY PROSPECTIVE EFFECT

In *Halperin*, the government urges this Court to give the decision in *United States v. United States District Court*, 407 U.S. 297 (1972) ("*Keith*") and the Court of Appeals' decision in *Zweibon I* only prospective effect. Whatever position this Court may take with respect to the application of *Zweibon I* to the plaintiffs in *Halperin*, it should make clear that the original litigants in *Zweibon I*—who arduously sought and won a landmark decision—are entitled to secure a meaningful judgment in that litigation.[3]

That result would be in accordance with the well-established rules applied by this Court. Thus, for example, although this Court gave only prospective effect to the principles announced in *United States v. Wade*, 388 U.S. 218 (1967), *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Mapp v. Ohio*, 367 U.S. 643 (1961), the prevailing party in each of those cases received the benefit of the new rule he established. The approach which the Court has taken is illustrated by its statement in *Desist v. United States*, 394 U.S. 244, 254-55 n.24 (1969), in which it refused to apply *Katz v. United States*, 389 U.S. 347 (1967), retroactively: "Of course, Katz himself benefited from the new principle . . . and . . . to that extent the decision has not techni-

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[3] The Court of Appeals in *Zweibon III* gave retroactive effect to its decision in *Zweibon I* regarding plaintiffs' Fourth Amendment claims but gave only prospective effect to its decision regarding plaintiffs' statutory claims. See p. 4, *supra*.

cally been given wholly prospective application." *See also Daniel v. Louisiana*, 420 U.S. 31 (1975), and *Taylor v. Louisiana*, 419 U.S. 522 (1975) (rule in *Taylor* applied prospectively except as to litigant in that case); *United States v. Peltier*, 422 U.S. 531 (1975), and *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (rule in *Almeida-Sanchez* applied prospectively except as to litigant in that case).

Similarly, in *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969), this Court gave the plaintiffs the benefit of a new rule of antitrust liability that was otherwise given only prospective effect. Earlier, in announcing the new rule which imposed antitrust liability on participants in consignment agreements, the Court had reserved the question whether the equities might warrant prospective application of the rule. *Simpson v. Union Oil Co.*, 377 U.S. 13, 24-25 (1964). On remand, the district court applied the rule purely prospectively, denying all damages. *Simpson v. Union Oil Co.*, 270 F.Supp. 754 (N.D.Cal. 1967). The Court of Appeals affirmed. *Simpson v. Union Oil Co.*, 411 F.2d 897 (9th Cir. 1969). The Supreme Court reversed, stating that it would be "most unusual" to deny relief to the party whose litigation established the new rule. The Court made clear that its earlier reservation of the retroactivity question was not intended "to deny the fruits of successful litigation to this petitioner." *Simpson v. Union Oil Co.*, 396 U.S. at 14.

This principle has been followed in a long line of cases in which a newly announced rule is applied to the litigant in that case even if it is otherwise given only prospective effect. *See, e.g., Plumley v. Hale*, 594 P.2d 497 (Alaska 1979); *Mendes v. Johnson*, 389 A.2d 781 (D.C. 1978) (en banc); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d

1226, 119 Cal. Rptr. 858 (1975) (en banc); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Kojis v. Doctors Hospital*, 12 Wisc. 2d 367, 107 N.W.2d 292 (1961); *Parker v. Port Huron Hospital*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960).

There are strong policy reasons for such an exception to prospective application of a new rule. Without it, there would be no incentive to litigate cases that may change the law. *See* Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631, 638 (1967) (hereinafter "Schaefer").[4] As the court noted in *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d at 28, 163 N.E.2d at 97 (1959):

> [T]o refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it.

Accord, Plumley v. Hale, 594 P.2d at 505; *Mendes v. Johnson*, 389 A.2d at 791; *Li v. Yellow Cab Co.*, 13 Cal. 3d at 830, 532 P.2d at 1244, 119 Cal. Rptr. at 876; *Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966). *See also* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 945 n.192 (1962) (hereinafter "Prospective Overruling").

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[4] Schaefer observes that if "the litigant whose efforts brought about the change in judicial doctrine receives no reward, other individual litigants would not be encouraged to attempt to reform the law through judicial decisions." Schaefer, 42 N.Y.U.L. Rev. at 638.

An exception for the litigant who brings the precedential case is particularly important in the civil context, where one party is seeking compensation for harm done to him by another. In fact, it has always been assumed in tort law that if a new legal theory of civil liability is upheld, the plaintiff is entitled to collect compensatory damages from the defendant. *See, e.g., Ford Motor Co. v. Mathis,* 322 F.2d 267 (5th Cir. 1963); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

Indeed, the rationale for limiting a new legal doctrine to prospective application is far less persuasive in a civil case, where compensation for actual harm suffered is the subject of the dispute, than in the criminal context, where the sole purpose of the new doctrine is prophylactic—*i.e.*, to deter unconstitutional or unlawful investigative or prosecutorial conduct. This is all the more true for individuals whose lawsuits establish the new legal doctrine. There is little basis in reason or policy to deny to them the compensation for harm actually suffered which other victims will, as a result of their litigation, be able to recover against the same or similarly situated defendants if the same conduct is repeated.[5]

Moreover, the good-faith immunity defense provides more than ample protection to defendants in such suits. If a defendant can establish that he believed his conduct

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[5] Individual litigants, such as the plaintiffs in *Zweibon*, are to be distinguished, in this regard, from institutional litigants who will benefit in the future from a change in policy effected by their litigation. *Plumley v. Hale*, 594 P.2d at 505; *Mendes v. Johnson*, 389 A.2d at 791.

to be lawful and that such a belief was reasonable, the plaintiff will go uncompensated for his actual harm, even if he establishes a new valid legal doctrine. Thus, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), recovery was not barred because new law was announced; rather, on remand to the Court of Appeals for the Second Circuit, recovery was made subject to the good-faith defense. *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (2d Cir. 1972).

To be sure, an exception for the litigant who establishes the new rule creates an inequality between him and others who are similarly situated. But one "who successfully challenges existing legal doctrine can be, and has been, regarded as having thereby set himself apart." Schaefer, 42 N.Y.U.L. Rev. at 638.[6] Thus, in a leading case, *Stovall v. Denno*, 388 U.S. 293, 301 (1967), this Court explained (footnote omitted):

> Inequity arguably results from according the benefits of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

The "sound principles of decision-making" to which this Court referred have their source in the case-or-controversy requirement of Article III of the Constitution.

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[6]Schaefer notes that permitting recovery to the particular litigant even if the decision is otherwise given only prospective effect, "has appealed to many state courts as a permissible way to limit the extent to which reliance is frustrated without making the court's determination an academic exercise; the Supreme Court of the United States has also used this technique." 42 N.Y.U.L. Rev. at 639 (footnote omitted).

Granting relief to the litigant who establishes the new rule is, as the Court noted, "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Id.*[7] *Accord, Simpson v. Union Oil Co.*, 396 U.S. at 14.

II

A SUBORDINATE OF THE PRESIDENT WHO ACTS NEITHER AT THE PRESIDENT'S DIRECTION NOR IN CONCERT WITH HIM IS IMMUNE FROM LIABILITY ONLY UPON A SHOWING OF AN ACTUAL AND REASONABLE BELIEF IN THE LEGALITY OF HIS ACTIONS

The government urges this Court to find that the President is specially and absolutely immune from civil liability. Whatever the Court may do in response to that argument, we urge the Court to follow *Butz v. Economou*, 438 U.S. 478 (1978), and hold that an Attorney General, who, in a particular instance, acts neither in specific concert with nor at the explicit direction of the President, may avoid liability only upon a showing of an actual and reasonable belief in the lawfulness of his actions.

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[7] The author of the note on *Prospective Overruling*, 71 Yale L.J. at 933, observed:

> [A] state court, after fashioning a new rule, may apply it: (1) to conduct occurring subsequent to the announcement only; (2) to conduct occurring subsequent to the announcement and also to the present litigants; or (3) to conduct occurring subsequent to the announcement, to the present litigants, and also to conduct which occurred prior to the announcement. For a federal court, however, the choice is more limited: Article III forecloses selection of the first alternative . . . .

The government does not argue in *Halperin* that cabinet officers are entitled to absolute immunity because of their own "special functions," preferring to rely upon the "close nexus" between presidential directions and individual conduct in that case. Brief for Petitioners at 50 n.44. In fact, petitioners' lengthy attempt to distinguish the President from his subordinates (*id.* at 25-44) belies any suggestion that his subordinates could also be entitled to absolute immunity based on their own "special functions" (*id.* at 50 n.44). Thus, for example, petitioners point out that only the President is elected; the electoral veto provides a check on his conduct unavailable with respect to his subordinates. This distinction undermines any argument that his subordinates also should be absolutely immune.

Similarly, the petitioners argue that the President has historically been immune from civil liability. Brief for Petitioners at 11, 20-26. There is no such history with respect to cabinet officers. In *Butz v. Economou*, the Secretary of Agriculture was a defendant. This Court did not suggest that he could escape liability merely on the basis of his position alone. *See also Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *modified on other grounds*, 100 S.Ct. 1987 (1980); *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979); *Apton v. Wilson*, 506 F.2d 83 (D.C.Cir. 1974); *State Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974).

The petitioners' principal argument—that the President's uniquely broad span of activity and responsibility make it unfair to impose liability for the effect of his decisions—similarly undercuts the notion that cabinet officers should be absolutely immune from liability. If it is true, as the government asserts, that "the easier or less

controversial matters are disposed of at a lower level" leaving the "difficult choices among reasonable alternatives" for the President (Brief for Petitioners at 26), there is concomitantly less reason to immunize the decisions made at a lower level.

Similarly, to the extent that the petitioners' argument for absolute presidential immunity rests on the President's unique position within our government, it supports the conclusion that absolute immunity should not be extended to the President's subordinates. The petitioners quote extensively, for example, from II D. Watson, *The Constitution of the United States*, 1023-24, 1025-26 (1910) (Brief for Petitioners at 27-28 n.24), which points out the ways in which the responsibilities and burdens of the executive branch—as compared to the legislative and judicial branches—rest in one man alone. Thus, while the "legislative branch is composed of many members" and the "judicial branch is a collective body"—and it would be difficult "to injure either numerically so as to interfere with the administration of the Government"—that is not true for the executive branch, where "[o]ne man constitutes all there is of that . . . . Thus, the petitioners' authority concludes, "it is only because the President is clothed with so extraordinary a power that he can be said to be exempt from the operations of the law." The obverse is that the President's subordinates have no such claim to absolute immunity.

The petitioners concede that their arguments for absolute presidential immunity rest on the uniqueness of the President's position. They state (Brief for Petitioners at 41-42; emphasis added):

> [T]he President does occupy *a position far different from those held by his subordinates* . . . . As the highest elected official in the Nation and the *only*

> *constitutional officer* in the Executive Branch, the Chief Executive possesses *powers and responsibilities that are unparalleled* in the government .... The complexity, importance, and controversial nature of the issues that come to the President's attention; the commitment of the *full executive power to a single individual*. . . ; his unique status as the only official in the Executive Branch who is chosen by . . . the electorate . . . *distinguish the Office of the President.*

Thus, none of the arguments marshalled by petitioners for conferring absolute immunity on the President supports such a conclusion with respect to his subordinates. In fact, to the extent that petitioners' position rests upon the uniqueness of the presidency, the broad span of the President's control, or his special elective post, it undercuts any claim of absolute immunity for cabinet officers.

The only argument advanced by petitioners in support of granting presidential subordinates absolute immunity is based upon the fact that they may act with or at the explicit direction of the President. Where, as in *Zweibon*, however, the subordinate acts in his own domain, independently of the President, he can make no such claim to derivative immunity. There is no cloak of advice and consultation arguably provided by Article II, Section 2, of the Constitution. And there is no protection for independent conduct of the sort which might result from following the orders of the Commander-in-Chief.

A decision granting a cabinet officer absolute immunity would seriously undermine the holding of *Butz v. Economou*, 438 U.S. 478 (1978), that federal officials generally have only qualified immunity. If the Attorney General, for example, is entitled to absolute immunity because of his "special functions," he would escape

liability in every meritorious *Bivens* suit, but his subordinates would not. Such a result would be intolerable. As this Court stated in *Butz* (438 U.S. at 505-06):

> It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority.

If high government officials have absolute immunity, a suit for redress of constitutional torts would provide neither compensation to the injured nor deterrence of future wrongs (438 U.S. at 506):

> [T]he greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

The Court in *Butz* was not unmindful of the weighty responsibilities of high government officials, but found that those responsibilities are more properly considered in the context of the officials' good-faith defense. It quoted with approval *Apton v. Wilson*, 506 F.2d at 93 (438 U.S. at 501 n.28):

> Having a wider territorial responsibility than the head of a state government, a Federal cabinet officer may be entitled to consult fewer sources and expend less effort inquiring into the circumstances of a localized problem. But these considerations go to the showing an officer vested with a qualified immunity must make in support of a 'good faith belief;' they do not make the qualified immunity itself inappropriate. The head of an executive

> department, no less than the chief executive of a state, is adequately protected by a qualified immunity.

The facts in *Zweibon* demonstrate the wisdom of *Butz*, *Apton* and the two-part immunity defense of *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In March 1969, this Court remanded a number of cases in which the United States had disclosed that federal agents had conducted warrantless electronic surveillances in which criminal defendants had been overheard. *Alderman v. United States*, 394 U.S. 165 (1969); *Giordano v. United States*, 394 U.S. 310 (1969); *Taglianetti v. United States*, 394 U.S. 316 (1969). Mr. Justice Stewart, concurring in *Giordano*, noted that the Court had not addressed itself to the gathering of "foreign intelligence information" which he defined as "necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage." 394 U.S. at 314. This definition was taken *verbatim* from the United States' petition for rehearing in *Ivanov v. United States*, 394 U.S. 165, *rehearing denied*, 394 U.S. 939 (1969).

Within ten days, memoranda were sent to then Attorney General Mitchell by J. Walter Yeagley, Assistant Attorney General in the Internal Security division (now a member of the District of Columbia Court of Appeals) and then Solicitor General Erwin Griswold. Mr. Yeagley's memorandum expressed his view that under the Supreme Court's ruling (p. 3a, *infra.*; App. 489):[8]

> [T]he best installations to defend, from the standpoint of legality, are those which are aimed at

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[8] "App." refers to the Joint Appendix on Appeal in *Zweibon III.*

> gathering foreign intelligence information or information necessary for the protection of national defense secrets and installations from foreign espionage and sabotage.

Mr. Yeagley argued that the Department of Justice should only contend that an electronic surveillance installed on the Attorney General's authority is lawful if it satisfied any of the five objectives specified in 18 U.S.C. § 2511(3), which had been enacted in 1968. He acknowledged that these were "the standards that guide the Attorney General today and which we will be defending in the future" (p. 4a, *infra.*; App. 490).

Assistant Attorney General Yeagley recognized that "some installations probably could not be justified even under the statutory criteria," including those on "domestic organizations with no clear foreign attachment which would pose difficult First and Fourth Amendment problems." (p. 5a, *infra.;* App. 490).

Solicitor General Griswold's advice was even more restrictive. Noting that it would be desirable to litigate and obtain judicial rulings on the legality of "national security" surveillances, the then Solicitor General said that it was therefore important for the Department of Justice to "decide on the precise situations in which we wish to contend that the President has power to authorize electronic surveillance to protect the national security." Mr. Griswold then gave his legal judgment (p. 8a, *infra.*; App. 498-99; emphasis added):

> It could be argued that such power extends to the protection of the national security from internal subversion and, thus, the Attorney General could, without court order, constitutionally authorize electronic surveillance of the [deleted] or other subversive organizations or any officers or members of

> such organization. *I believe, however, that any attempt to sustain such surveillances would be disastrous. Not only would we not prevail on the particular facts presented* but I believe we would get a broad ruling that all electronic surveillance is unconstitutional if conducted without a warrant.

In a subsequent memorandum, Mr. Griswold said (p. 15a, *infra.*; App. 508; emphasis added):

> Thus, I think our chances of success are much greater if we limit our submission that the Attorney General can constitutionally authorize electronic surveillance to those instances where the surveillance is designed to gather foreign intelligence information. *In fact, I think that we should limit our attempt to sustain the legality of such surveillance to instances involving the surveillance of a foreign establishment.*

The memorandum concluded with Mr. Griswold's observation that "[i] f a domestic organization is engaged in a criminal conspiracy, we can obtain a warrant to authorize eavesdropping under the Crime Control Act, but there is no procedure under the Act to get a warrant to eavesdrop for foreign intelligence purposes" (p. 16a, *infra.*; App. 509).

Assistant Attorney General Wilson also submitted a memorandum of little more than one page, in which he asserted that "wiretaps involving the dangerous and violent internal subversion" should be defended as legal. No detailed legal reasoning was provided (p. 19a, *infra.*; App. 510). There is no indication that Mr. Mitchell received advice from anyone else.

Rejecting strong advice from his Solicitor General to the contrary, the Attorney General authorized warrantless wiretaps on a domestic group unaffiliated with a

foreign government. In so doing, he was not "conform-[ing] . . . to the prevailing statutory or constitutional norm." *United States v. Peltier*, 422 U.S. 531, 542 (1975). Rather, he was taking a chance deliberately, on "notice that a constitutional right was at risk." *Owen v. City of Independence, Missouri*, 100 S.Ct. 1398, 1425 (1980) (Powell, J., dissenting). Such conduct should not be shielded from liability merely because he was a cabinet officer.[9]

The petitioners in *Halperin* argue, alternatively, that they are entitled to qualified immunity "as a matter of law." Brief for Petitioners at 50-62. By this they mean that, in the absence of an "authoritative declaration" of the law (*see id.* at 51-52), no liability can attach even if the official did not, in fact, believe that his conduct was lawful or if he had no reasonable basis for believing that his conduct was lawful. Such a standard would permit an official who has been advised that a proposed course of conduct is unlawful to avoid liability merely by showing that the Supreme Court had not yet spoken directly to the issue. That is not the standard established by this Court in *Scheuer v. Rhodes*, 416 U.S. at 247-48, and

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[9] Under *Butz v. Economou*, the Attorney General may be entitled to absolute immunity when he decides "whether a particular prosecution shall be instituted . . . ." 438 U.S. at 510, quoting *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927). Prosecutorial immunity does not, however, extend to investigate decisions such as whether to institute or carry out searches. *Bivens v. Six Unknown Named FBI Agents*, 403 U.D. 388 (1971); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1214 (3d Cir. 1979): *Apton v. Wilson*, 506 F.2d 83, 94 (D.C.Cir. 1974); *Guerro v. Mulhearn*, 498 F.2d 1249, 1256 (1st Cir. 1974); *Hampton v. City of Chicago*, 484 F.2d 602, 608 (7th Cir. 1973); *cert. denied*, 415 U.S. 917 (1974).

applied to federal officials in *Butz v. Economou*, 438 U.S. at 497-98 (emphasis added):

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, *coupled with good-faith belief*, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

The record in *Zweibon* provides ample evidence of the danger and unfairness inherent in affording more than this—absolute immunity or "qualified immunity as a matter of law"—to federal officials.

CONCLUSION

We have submitted this brief to emphasize the points that are critical to our litigation, which the Court has held in abeyance pending the result in *Kissinger v. Halperin*, No. 79-880. Whatever may be the particular outcome of that case, this Court should either deny the petition for a writ of certiorari in *Zweibon v. Mitchell*,

No. 79-881, or, if it issues a writ of certiorari, (1) affirm the judgment below to the extent that it remands the case to the district court for trial, and (2) reinstate plaintiffs' claims under Title III.

Respectfully submitted,

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APPENDIX A

The Attorney General — April 1, 1969

J. Walter Yeagley
Assistant Attorney General
Internal Security Division

Hearings on Remand of Cases Involving
Electronic Interceptions

This memorandum will first be forwarded to the Solicitor General and Mr. Will Wilson for consent.

As a result of the several opinions of the Supreme Court on March 24, 1969, a number of Criminal Division and Internal Security Division cases have been remanded to the district courts for further hearings in connection with electronic eavesdropping.

The central issue in each of these hearings will be the question of the legality or illegality of certain specific electronic eavesdropping installations most of which were at various times and for varying reasons personally authorized by the Attorney General under Presidential delegation.

In the government's petition for rehearing in the espionage case involving *Igor Ivanov*, the Solicitor General limited the request to that portion of the decision of the Court concerning disclosure of "electronic surveillance relating to the gathering of foreign intelligence information, which term we use to include the gathering of information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage."

Deputy AG	Mr. Yeagley	Courtesy
AAG, Criminal	Mr. Maroney	
Sol. General	Mr. Davitt	

In Justice Stewart's concurring opinion in *Giordano v. United States*, he made it perfectly clear that the Supreme Court was not then deciding whether the electronic surveillances in question violated the Fourth Amendment, but that this was being left as a "threshold question for the District Court to decide." He also said that the Supreme Court has "nowhere indicated that this determination cannot appropriately be made in *ex parte, in camera* proceedings."

Justice Stewart went on to say that the Court has not addressed itself "to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage."

The forthcoming hearings on remand will involve disclosures relating to electronic eavesdropping on - - -

the organized crime area were subsequently ratified by Attorney General Katzenbach. We do not believe that the illegality of these installations should be conceded although we should avoid testing their legality if at all possible at the present time by turning over the surveillance logs.

This would apply to three installations in the *Ivanov* case assuming the Bureau and State Department approve. They have previously approved *in camera* inspection. It seems clear that the best installations to defend, from the standpoint of legality, are those which are aimed at gathering foreign intelligence information or information necessary for the protection of national defense secrets and instaliations from foreign espionage and sabotage. However, the Internal Security Division believes if we limit our criteria to those areas, we are too narrowly confined. For example, a tap placed on - - - - - - - - - - - - - - - - - - [deletion] - - - - - - - - or a para-military organization or any other organization that seeks the violent overthrow of the government probably could not be sustained although - - - - - - - - [deletion] - - - - - - - - - - - - - - foreign attachment would offer an added argument in that instance.

Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968, recognizes a broader authority in the President, acting through the Attorney General, to approve electronic surveillances. Section 2511 provides:

> "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power to obtain foreign intelligence informa-

> tion deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary, to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. . .

This is obviously a codification by the Congress of its view of the standards which would justify this important exception to the prohibitions against electronic eavesdropping.

Thus, we should contend that an electronic surveillance which was installed on the specific authorization of the Attorney General is a lawful installation as the Attorney General's authorization was premised on information which led him to the reasonable belief that such installation was necessary (1) "to protect the Nation against actual or potential attack or other hostile acts of a foreign power." (2) "to obtain foreign intelligence information deemed essential to the security of the United States," (3) "to protect national security information against foreign intelligence activities," (4) "to protect the United States against the overthrow of the government by force or other unlawful means," or (5) "to protect the Nation against any other clear and present danger to the structure or existence of the government." The latter criterion, of course, must be read in a context of protecting the structure or existence of the government from change by force and violence. The foregoing are, in fact, the standards that guide the Attorney General today and which we will be defending in the future. They have been at least implicitly sanc-

tioned by Congress. The Criminal Division and Internal Security Division believe we should adopt them for purposes of presentation of the legal issues in these limited hearings.

It should be noted, however, that some installations probably could not be justified even under the statutory criteria. This would not only include organized crime taps and mikes, but also some internal security installations such as those on - - - - - - - - - - - - [deletion] - and domestic organizations with no clear foreign attachment which would pose difficult First and Fourth Amendment problems. The illegality of these installations need not be conceded but all interceptions of a defendant and all such interceptions from the premises of a defendant must be turned over to the defendant or the case must be dismissed.

After the approval of a general policy as above, each case involving a security installation must be resolved on an ad hoc basis. Those involving organized crime installations present a choice of disclosure or dismissal.

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APPENDIX B

The Attorney General

April 3, 1969

JSM:gsm

The Solicitor General

The purpose of this memorandum is to consider what action should be taken by the Department of Justice in light of the Supreme Court's decision in *Alderman v. United States*, No. 133, O.T. 1967, decided March 10, 1969, and *Giordano v. United States*, No. 28, this Term, decided March 24, 1969, and *Taglianetti v. United States*, No. 446, this Term, decided March 24, 1969. This question has two parts (1) what action should the government take in those cases presently pending in which we have disclosed the fact that the defendant has been overheard during the course of an electronic surveillance and (2) what action should we take now and in the future with regard to the disclosure of the fact that defendant or his premises were subject to electronic serveillance. With regard to each of these issues, I shall endeavor to set forth some of the possible alternative courses of action and then indicate the course that I think appropriate.

1. *Cases in which some disclosure has already been made.*

[deletion]

A. *Cases where we do not contend that the surveillance was lawful.*

[deletion]

B. *Alternative to disclosure where the surveillance was illegal.*

[deletion]

C. *Procedure where we claim that the disclosed surveillance was legal.*

The opinion of the court in *Alderman*, as clarified in *Giordano* and *Taglianetti*, provides that the district court must determine whether the surveillance at issue was lawful. The Court specifically noted in *Giordano* that "a finding by the district court that the surveillance was lawful would make disclosure and further proceedings unnecessary." Thus, in those cases where the surveillance was authorized by the Attorney General in the interest of national security, we can contend in the district court that the surveillance was legal (see *Katz v. United States*, 389 U.S. 347, 362-364 (White, J. concurring)) and that the defendant is not entitled to any disclosure.

The Court's opinion in *Taglianetti* makes clear that *Alderman* does not require "an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance," and Justice Stewart's concurring opinion in *Giordano* strongly suggests that the question of the legality of a surveillance may be determined on the basis of an *in camera* presentation of the facts to the district judge. Thus, if we were able to establish that the surveillance was legal on an *in camera* presentation of the facts to the district judge, we would not have to make any damaging disclosure to the defendant.

We must consider, however, whether we want to press the courts to decide whether the President acting through the Attorney General has the constitutional power to authorize wiretapping and eavesdropping without a warrant in order to protect the national security. As matters stand now we can always defend such actions on the ground that it is lawful. If, however, the courts decide the issue against us, the President will be faced with the choice of discontinuing all such surveillances or continu-

ing to authorize action which the courts have declared unconstitutional. If we do not litigate the issue of legality, we could justify a policy of not disclosing such surveillances to a defendant in future cases on the ground that we believe that only illegal surveillances should be disclosed. Thus, we *might* be able to avoid this problem in future cases.

I am persuaded, however, that we should litigate the question of the legality of such surveillances in the present cases. I do not believe the problem will go away. Even if we change our voluntary disclosure policy, defense counsel can still make motions to require us to disclose whether or not the defendant was overheard during *any* electronic surveillance. If such a motion were made, I think that the Court would not let us hide behind a claim that it was our opinion that any surveillance that did occur was legal. Therefore, I believe that we may as well litigate the question of the legality of national security surveillances in the pending cases.

If we determine to litigate this question, we must decide on the precise situations in which we wish to contend that the President has power to authorize electronic surveillance to protect the national security. It could be argued that such power extends to the protection of the national security from internal subversion and, thus, the Attorney General could, without court order, constitutionally authorize electronic surveillance of the - - - [deletion] - - - - or other subversive organizations or any officers or members of such organization. I believe, however, that any attempt to sustain such surveillances would be disastrous. Not only would we not prevail on the particular facts presented but I believe we would get a broad ruling that all electronic surveillance is unconstitutional if conducted without a warrant.

In our petition for rehearing in *Ivanov* we limited our submission that the Attorney General could constitutionally authorize electronic surveillance to those situations where the purpose of the surveillance was to gather information necessary for the conduct of international affairs and for the protection of national defense secrets and installations from foreign espionage or sabotage. I would similarly limit our submission to the district courts on remand. Not only is such an approach more likely to be successful, but our need to isolate the surveillances from disclosure is the strongest in this area. Although the disclosure of the wiretapping or bugging of a domestic subversive organization might be embarrassing, we could not possibly disclose the location of our foreign intelligence surveillances. Moreover, to the extent that there is evidence that a domestic organization is engaged in serious criminal activity we could get a warrant under the Crime Control Act, but the Act does not provide the machinery for a warrant for a foreign intelligence surveillance. Thus, I strongly urge that we claim legality only for those surveillances expressly authorized by the Attorney General to gather foreign intelligence information and to protect national defense installations and secrets from foreign espionage and sabotage.

If we do seek to sustain the legality of such surveillances in the district courts, I strongly urge that these cases be uniformly handled and carefully presented. As we noted in our brief in *Ivanov*, in attempting to litigate such a question a problem arises because we cannot reveal to the defendant all of the facts concerning the surveillance. Thus, there is a problem of providing a procedure that will meet the standards of "due process" but yet withholds from the defense that information which cannot be disclosed. I would suggest that we adopt the following procedure:

An affidavit of the Attorney General should be filed with the district court and a copy given to defense counsel. The affidavit would state (1) that the defendant was overheard in the course of a surveillance which was not directed at him but was being conducted solely to gather foreign intelligence information, and give the approximate date of the overhearing; (2) that records of the Department of Justice establish that the surveillance was instituted at the express personal direction of the Attorney General and that a copy of the authorization is being submitted to the court for its in camera examination; (3) that it would prejudice the national interest to disclose any additional facts concerning the surveillance to the defendant; and (4) that a copy of the record of the surveillance, together with the relevant facts as to time and place, is being submitted to the court for its *in camera* examination so that the court can satisfy itself that the purpose of the surveillance was to gather foreign intelligence information.

I believe that this procedure will give the defense an adequate factual basis on which to argue the legal question concerning the Attorney General's constitutional power to authorize such a surveillance while protecting the government's interest in nondisclosure.

2. *Possible chances in disclosure policy in future cases.*

[deletion]

APPENDIX C

CONFIDENTIAL

April 7, 1969

MEMORANDUM FOR THE ATTORNEY GENERAL

RE: Hearings on remand of cases involving electronic interceptions

On April 3, 1969, I sent you a memorandum in which I undertook to summarize the results of the decisions of the Supreme Court in this field, including the recent decisions of the Court in *Ivanov v. United States, Giordano v. United States,* and *Taglianetti v. United States.* In addition, I undertook to raise and discuss some of the polity questions which remain in this area.

At about the time my memorandum was completed, I received a copy of the memorandum which Assistant Attorney General J. Walter Yeagley addressed to you on April 1, discussing the policy to be followed in cases of this sort in the future.

This memorandum is addressed to the suggestions contained in Mr. Yeagley's memorandum. I find myself in disagreement with some of his proposals regarding the instances in which we should contend that electronic surveillance authorized by the Attorney General is legal. Accordingly, I am writing this memorandum to set forth my views, with specific reference to Mr. Yeagley's suggestions. I am sending copies of this memorandum to Mr. Yeagley, Mr. Wilson, and to the Deputy Attorney General.

As I noted in my earlier memorandum to you, in our petition for rehearing in *Ivanov*, we limited our submission that the Attorney General could constitutionally

authorize electronic surveillance without a warrant to those instances where the purpose of the surveillance was to gather information necessary for the conduct of international affairs and for the protection of national defense installations and secrets from foreign espionage and sabotage.

Mr. Yeagley would have us broaden our claim of legality to embrace two other purposes: (1) "to protect the United States against the overthrow of the government by force or other unlawful means," and (2) "to protect the Nation against any other clear and present danger to the structure or existence of the government."

While it is true that in the Crime Control Act Congress indicated that the President acting through the Attorney General might have the power to authorize electronic surveillance for these purposes, I do not think the courts, particularly the Supreme Court, would systain [sic] such a power. Moreover, if we attempt to sustain the power of the Attorney General to authorize electronic surveillance for purely domestic purposes, we will, in my view, prejudice our efforts to sustain the legality of electronic surveillance directed at the activities of foreign powers. Thus, as a matter of litigation strategy, it is my opinion it would be unwise for us to seek to sustain the validity of electronic surveillance directed at the - - - - [deletion] - - - or other domestic individuals or organizations.

The Supreme Court has for the past several years, and with virtual unanimity, manifested great hostility to laws attempting to limit the rights of Communists and others suspected of engaging in subversive activities. During the last four years, we have lost every internal security case we have had in the Supreme Court. See *Albertson v. Subversive Activities Control Board*, 382 U.S. 70; *Gojack v. United States*, 384 U.S. 702; *Dennis v. United States*,

384 U.S. 855; *United States v. Lamb,* 385 U.S. 475; *Travis v. United States*, 385 U.S. 491; *United States v. Robel*, 389 U.S. 258; *Schneider v. Smith*, 390 U.S. 17. See also, *Brown v. United States*, 381 U.S. 437. It is significant that the Government not only lost these seven cases, but all of them were without dissent, except for two dissenting votes in one case, and two partial dissents in another. Thus, the Government was able to muster only four votes out of close to sixty in these seven cases.

While many of these cases were decided on narrow grounds, the fact that the Supreme Court ruled so firmly against us in all of them clearly supports the conclusion that the Court views with suspicion laws aimed at those suspected of subversive activities. Indeed, in *Robel* and *Schneider*, the Court struck down programs designed to preclude Communists from employment in defense facilities and in the merchant marine. The reasoning of the court in *Robel* is most significant. The Court said (389 U.S. at 264):

> "the Government asserts that [the statute making it a crime for a Communist to be employed in a defense facility] is an expression 'of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s].' Yet this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart. For almost two centuries our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed

> be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

I find little reason to doubt that the Court would react similarly if we attempted to argue that it is necessary, without a warrant, to eavesdrop on the conversations of Communists or others suspected of subversive activities in order to protect the "national security." This would be particularly true now, since under section 251 of the Crime Control Act, we can get an eavesdrop warrant if we have probable cause to believe that the eavesdrop may provide evidence of treason, espionage, sabotage or crimes relating to riots.

While it is never possible to predict with 100% accuracy what the Supreme Court will do in a future case, my thought is that Justice Stewart's concurring opinion in *Giordano* can well serve as a guide in our future actions. After pointing out that the question of legality was still open for decision in the district court, Justice Stewart noted:

> "The Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage.

Under all the circumstances, it seems to me unlikely that Justice Stewart would have written this concurrence unless he felt that a majority of the Court would uphold such conduct. It is significant, too, that he adopted the precise notion of "foreign intelligence" which we had suggested in *Ivanov* rather than the broad concept of

"national security" referred to in the concurring opinion of Justice White in *Katz v. United States*, 389 U.S. 347, 362-364.

In this regard, reference may also be made to the concurring opinion of Justice Douglas, joined by Justice Brennan, in *Katz*, 389 U.S. at 359-360. This rejects the idea that the President acting through the Attorney General can authorize eavesdropping in "national security" cases, and is based in large part on the idea that, since the President and Attorney General "may even be the intended victim of subversive action," they would not be as neutral as a magistrate. That reasoning would not apply, however, to surveillances designed to gather "foreign intelligence information."

Thus, I think our chances of success are much greater if we limit our submission that the Attorney General can constitutionally authorize electronic surveillance to those instances where the surveillance is designed to gather foreign intelligence information. In fact, I think that we should limit our attempt to sustain the legality of such surveillance to instances involving the surveillance of a foreign establishment.

I agree with Mr. Yeagley that there is no reason for us to concede that only foreign intelligence surveillances may be constitutionally authorized by the Attorney General. My point is, rather, that we should, for the present, at least, litigate the legality issue only in cases involving foreign intelligence surveillances conducted at foreign establishments.

In our original briefs in *Alderman* and *Ivanov* we tried to protect from unnecessary disclosure any electronic surveillances conducted by the government. The result of this effort to protect ourselves on all fronts was the opinion of the Court in *Alderman* which, until the

clarification in *Giordano* and *Taglianetti*, could be construed as requiring us to disclose all surveillances. With the benefit of hindsight, it might have been better had we originally limited our submission in *Alderman* to the question of "standing," and in *Ivanov* to the position we ended up with in the petition for rehearing in *Ivanov*.

Fortunately, Justice Stewart's concurring opinion in *Giordano* gives us some hope that we may yet prevail with regard to foreign intelligence surveillances. Nevertheless, we are now faced with a last ditch fight to protect our right not to disclose the facts concerning foreign intelligence operations. In this situation, it is not wise, in my view, for us to try at this time to win for ourselves the greatest possible protection. Rather, we should decide what ground we have a chance to hold, and then make every effort to secure approval of th t [sic] position.

Obviously, it is highly desirable that we not be placed in a position where we are forced to disclose foreign intelligence surveillances. It is not as necessary that we preclude disclosure of surveillances directed at domestic subversive activities. This is for two reasons: (1) the embarrassment attendant upon disclosure of domestic surveillances is not comparable to that which would result if we were forced to disclose foreign intelligence surveillances; (2) If a domestic organization is engaged in a criminal conspiracy, we can obtain a warrant to authorize eavesdropping under the Crime Control Act, but there is no procedure under the Act to get a warrant to eavesdrop for foreign intelligence purposes.

Thus, my recommendation is that we litigate the question of the Attorney General's power to authorize electronic surveillance only in those cases where the surveillance was conducted at a foreign establishment in order to gather foreign intelligence information or to

protect defense secrets and installations from foreign espionage and sabotage.

Erwin N. Griswold
Solicitor General

CC: Deputy Attorney General
Mr. Yeagley—Internal Security
Mr. Wilson—Criminal
Mr. Martin—SG's staff

APPENDIX D

The Attorney General

April 15, 1969
t. 4-8-69

Will Wilson
Assistant Attorney General
Criminal Division

Electronic Surveillance

Assistant Attorney General J. Walter Yeagley has forwarded to me for comment his April 1, 1969 memorandum to you concerning the standards to be applied in determining which non-judicially authorized national security surveillances to contend were constitutional.

I agree that:

1. Our claims of constitutionality should not be limited to the types of surveillances described in our Petition for Rehearing in the *Ivanov* case, since no provision was made for any wiretaps involving the dangerous and violent internal subversion.

2. Our claims of constitutionality should at least go so far as to reach the types of electronic surveillances described in the 1968 Federal eavesdropping statute which recognizes the President's power "to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."

3. In determining which surveillances to claim were constitutional, we should not lock ourselves into any promises in the courts to confine our constitutionality

contentions only to certain types of security surveillances. Each surveillance should be determined on a case by case basis.

I do not agree that we could not successfully urge the constitutionality of certain security microphones (installed by trespass) which were approved by the FBI Director under a general delegation of authority from the Attorney General. I do feel, however, that this issue need not be decided now, but can await the appropriate case, i.e., where the device cannot be revealed and the prosecution cannot be abandoned.